

SERVICE DATE – LATE RELEASE DECEMBER 5, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34794¹

BNSF RAILWAY COMPANY
– ACQUISITION AND OPERATION EXEMPTION –
STATE OF SOUTH DAKOTA

Decided: December 5, 2005

This decision denies a petition by John D. Fitzgerald, for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), to stay the effective date of BNSF Railway Company's (BNSF) 49 CFR § 1150.31 notice of exemption (in the lead docket) and the 7 related 49 CFR § 1180.2(d)(7) or (8) notices of exemption (in the 7 embraced dockets).

BACKGROUND

The Core Lines. This proceeding concerns certain railroad lines (referred to as the "Core Lines") that are owned by the State of South Dakota (the State), and that are the subject of a 1986 Operating Agreement between a BNSF predecessor (Burlington Northern Railroad Company) and the State. The Core Lines, which include approximately 368 route miles, extend principally: between Milepost (MP) 777.0 near Aberdeen, SD, and MP 650.6 near Mitchell, SD; between MP 518.9 near Sioux City, IA, and MP 649.7 near Mitchell, SD; between MP 293.1 near Canton, SD, and MP 650.6 near Mitchell, SD; between MPs 74.1 and 68.8 in Sioux Falls, SD; between MP 68.8 near Sioux Falls, SD, and MP 49.4 near Canton, SD; and between

¹ Embraces: STB Finance Docket No. 34125 (Sub-No. 1), South Dakota Railroad Authority – Acquisition and Operation Modification Exemption – BNSF Railway Company; STB Finance Docket No. 34685 (Sub-No. 1), D&I Railroad Company – Trackage Rights Exemption – BNSF Railway Company; STB Finance Docket No. 34786, Sioux Valley Regional Railroad Authority and D&I Railroad Company – Trackage Rights Exemption – BNSF Railway Company; STB Finance Docket No. 34787, D&I Railroad Company – Trackage Rights Exemption – BNSF Railway Company; STB Finance Docket No. 34788, Mitchell-Rapid City Regional Railroad Authority and Dakota Southern Railway Company – Trackage Rights Exemption – BNSF Railway Company; STB Finance Docket No. 34789, Dakota, Minnesota & Eastern Railroad Corporation – Trackage Rights Exemption – BNSF Railway Company; and STB Finance Docket No. 34790, Dakota, Minnesota & Eastern Railroad Corporation and Iowa, Chicago & Eastern Railroad Corporation – Temporary Trackage Rights Exemption – BNSF Railway Company.

MPs 511.9 and 518.9 in Sioux City, IA. The Core Lines were once part of the rail system operated by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (the Milwaukee Road), which entered bankruptcy in 1977, and which later (in 1980) received, both from the Interstate Commerce Commission (ICC) and from the bankruptcy court, approval to abandon the Core Lines. In 1981, the abandoned Core Lines were acquired by the State, and, since on or about July 6, 1981, BNSF has provided common carrier rail service over the Core Lines pursuant to various agreements (the most recent of which is the 1986 Operating Agreement) with the State, and pursuant to a Modified Certificate of Public Convenience and Necessity (the Modified Certificate) issued by the ICC. See 49 CFR Part 1150, Subpart C.

BNSF's First Exemption Notice. On December 23, 2004, BNSF filed, in STB Finance Docket No. 34645, a verified notice of exemption under 49 CFR 1150.31 to acquire and operate the Core Lines. By decision in that docket served on January 14, 2005, the Board rejected the BNSF exemption notice and directed BNSF to file either a petition for exemption pursuant to 49 U.S.C. 10502, or an application for authority pursuant to 49 U.S.C. 10901, either of which would enable the Board to compile a sufficient record to resolve the issues that had been raised by the State in a petition to stay the December 23, 2004 notice of exemption.

BNSF's Application. On February 18, 2005, BNSF filed, in STB Finance Docket No. 34667, a § 10901 application to acquire and operate the Core Lines. In a decision served in that docket on March 3, 2005, and published in the Federal Register on March 8, 2005, the Board announced that the BNSF application had been filed and requested interested persons to submit comments. Comments were submitted by the State of South Dakota; and UTU/GO-386. Thereafter, by joint motion filed May 19, 2005, BNSF and the State asked that the application proceeding be stayed pending the implementation of the terms and conditions of an agreement that had been reached between BNSF and the State, dated as of April 25, 2005. By decision served May 25, 2005, the application proceeding was ordered held in abeyance until October 25, 2005.

BNSF's Second Exemption Notice. On November 29, 2005, BNSF filed, in STB Finance Docket No. 34794, another § 1150.31 exemption notice to acquire and operate the Core Lines, and various other parties filed § 1180.2(d)(7) or (8) exemption notices in the 7 embraced dockets. BNSF contends that, because the competitive concerns previously expressed by the State about the proposed transaction have been resolved pursuant to the parties' settlement agreement, the transaction is appropriate for consideration under the § 1150.31 class exemption procedure. BNSF further contends that any concerns that UTU/GO-386 may have can be appropriately and fully considered pursuant to a petition to revoke.

UTU/GO-386's Stay Petition. By petition filed December 5, 2005, UTU/GO-386 seeks a stay of the effective date of BNSF's § 1150.31 exemption (in the lead docket) and the 7 related § 1180.2(d)(7) or (8) exemptions (in the 7 embraced dockets). A stay is necessary, it argues, to enable examination and consideration of the terms of the BNSF-State Settlement Agreement (dated April 25, 2005) as well as the terms of the First Amendment to such Settlement Agreement (the First Amendment is dated November 22, 2005). A stay is also necessary, UTU/GO-386 adds, to enable examination and consideration of the 7 related exemption notices, as well as other agreements not filed with the Board and presently unavailable. UTU/GO-386

therefore asks that operation of the exemption notices in the lead docket and the 7 embraced dockets be stayed until such time as it has had an opportunity to conduct discovery, and an opportunity to submit comments and/or petitions.

Reply To The Stay Petition. On December 5, 2005, a reply to the stay petition was jointly filed by BNSF and the “State Applicants” (Sioux Valley Regional Railroad Authority, D&I Railroad Company, Mitchell-Rapid City Regional Railroad Authority, Dakota Southern Railway Company, Dakota, Minnesota & Eastern Railroad Corporation, Iowa, Chicago & Eastern Railroad Corporation, and the State of South Dakota by and through its Department of Transportation). BNSF and the State Applicants urge the denial of the stay petition. They maintain that the assertion that UTU/GO-386 and its counsel have not had an opportunity to review the relevant agreements is unfounded and that the stay petition provides no basis for granting a stay.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, “it is the movant’s obligation to justify the . . . exercise of such an extraordinary remedy.” Cuomo v. United States Nuclear Regulatory Comm., 772 F.2d 972, 978 (D.C. Cir. 1985). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Although UTU/GO-386 seeks a stay of the effective date of both BNSF’s § 1150.31 notice and the 7 related § 1180.2(d)(7) or (8) notices, UTU/GO-386 has no quarrel with the Core Lines acquisition that is the subject of BNSF’s § 1150.31 notice; as a practical matter, UTU/GO-386 takes issue only with the grants of authority encompassed by the 7 related notices. That this is indeed the reality of the situation is made plain by the comments UTU/GO-386 filed in the STB Finance Docket No. 34667 application proceeding. In those comments, UTU/GO-386 advised that it supported the BNSF application and asked that it be approved without conditions. Approval of the BNSF application, UTU/GO-386 explained, would appear to change the legal form of BNSF from operator under a modified certificate to a regular certificate holder under § 10901, and would thus appear to give greater stability for continued operations. Approval of the application and BNSF operation, UTU/GO-386 added, should ensure minimum protection for BNSF employees in the event of abandonment or discontinuance, whereas at present the status of employee protection may be in doubt. As respects the conditions that had been requested by the State in the application proceeding, UTU/GO-386 argued that such conditions would be adverse to BNSF employees because the sharing of BNSF lines with other railroads might result in diminished BNSF traffic, adverse operating conditions, and/or pressure on BNSF employees for various concessions.

The conditions requested by the State in the application proceeding are now encompassed in the transactions contained in the 7 related notices. And it is the authorization of these transactions that UTU/GO-386 opposes, presumably for the same reasons UTU/GO-386 opposed the conditions requested by the State in the application proceeding. But these authorizations are not inappropriate for handling by notices of exemption. BNSF's proposed acquisition of the Core Lines is suitable, in the context of its settlement with the State, for handling under the § 1150.31 class exemption procedure. The transactions covered by the 7 related notices appear to be "garden variety" transactions (each involves a fairly limited grant of rights by a Class I carrier to a smaller carrier), and, therefore, these transactions are clearly also suitable for handling under the § 1180.2(d)(7) or (8) class exemption procedure. The petition for revocation process is available should UTU/GO-386 be able to demonstrate otherwise.

The traditional stay criteria do not favor a stay. UTU/GO-386 has not demonstrated that the workers it represents will suffer irreparable harm in the absence of a stay; it has not alleged substantial harm to other interested parties; and it has not demonstrated that the public interest supports the grant of a stay. The stay petition will therefore be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The stay petition filed December 5, 2005, by UTU/GO-386 is denied.
2. This decision is effective on its service date.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary