

SERVICE DATE – LATE RELEASE DECEMBER 2, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34794

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

Decided: December 2, 2005

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 the State and the Burlington Northern Railroad Company, which was a predecessor to the railroad now known as BNSF Railway Company (BNSF). The Core Lines had previously been 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, in 1980, received approval to abandon the Core Lines. In 1981, the abandoned Core Lines were acquired by the State. Since then, BNSF (or, prior to 1997, its predecessor) has provided common carrier rail service over the Core Lines pursuant to various agreements with the State, and pursuant to a Modified Certificate of Public Convenience and Necessity issued by the Board’s predecessor, the Interstate Commerce Commission (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 served in that docket on January 14, 2005, the Board rejected the exemption notice and directed BNSF to file either a § 10502 exemption petition or a § 10901 application, either of which would enable the Board to compile a record that would allow the Board to resolve the issues that had been raised by the State in the petition to stay that the State had filed on December 29, 2004.

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. By decision served May 25, 2005, the application proceeding was ordered held in abeyance until October 25, 2005, 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.

BNSF’s Second Exemption Notice. On November 29, 2005, BNSF filed, in STB Finance Docket No. 34794, another § 1150.31 verified notice of exemption to acquire and operate the Core Lines. BNSF contends that, because the concerns previously expressed by the State about

the proposed transaction have been resolved pursuant to the parties' settlement agreement, it is appropriate for consideration under the § 1150.31 class exemption procedure.

Protective Order. By motion filed November 29, 2005, the South Dakota Department of Transportation (DOT) has requested that the Board issue a protective order allowing DOT to file under seal the Settlement Agreement, along with an amendment thereto (collectively the "Settlement Agreement"), that is the subject of this proceeding. DOT contends that the Settlement Agreement has been the subject of extensive private negotiations between the parties, and contains commercially sensitive and confidential information the public release of which would cause competitive or other injury to the parties. DOT further contends that public disclosure of the complete agreement is not necessary for the consideration or disposition of BNSF's notice of exemption. DOT has therefore asked that the Board accept the complete Agreement for filing under seal and adopt a protective order that appears to be patterned upon the protective order issued in CSX Transportation, Inc. – Trackage Rights Exemption – Norfolk Southern Railway Company, STB Finance Docket No. 34254 (STB served Oct. 24, 2002).

Good cause exists to grant a protective order. Issuance of a protective order will ensure that confidential information will be used solely for this proceeding and not for other purposes.¹

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

It is ordered:

1. DOT's motion for a protective order is granted. The unredacted version of the Settlement Agreement submitted in STB Finance Docket No. 34794 will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless otherwise ordered by the Board.
2. The Protective Order and Undertaking contained in the Appendix to this decision is adopted.
3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

¹ DOT has not submitted a redacted version of the material it filed with its protective order motion. The Board expects that DOT will submit a redacted version as soon as possible.

APPENDIX

PROTECTIVE ORDER

1. For the purposes of this Protective Order, "Confidential Information" means the Settlement Agreement entered into April 25, 2005, by and between BNSF Railway Company and the State of South Dakota, by and through the South Dakota State Railroad Board and the South Dakota Department of Transportation, and the First Amendment thereto, entered into November 22, 2005, both of which were filed in STB Finance Docket No. 34794 on November 29, 2005.

2. Confidential Information shall be provided to any party only pursuant to this Protective Order and only upon execution and delivery to the South Dakota Department of Transportation (DOT) of the attached Undertaking. Confidential Information shall be used solely for the purpose of this and any related Board proceedings, or any judicial review proceeding arising therefrom, and not for any other business, commercial or other competitive purpose.

3. Confidential Information shall not be disclosed in any way or to any person without written consent of DOT or an order of the Board, except that Confidential Information shall be disclosed to a person, but solely for use in connection with this and related Board proceedings, or any judicial review proceeding arising therefrom, provided that such person has been given and has read a copy of this Protective Order and agrees to be bound by its terms by executing the attached Undertaking prior to receiving access to this information.

4. Any documents containing Confidential Information must be destroyed, and notice of such destruction must be served on DOT at the completion of this and any related Board proceedings, or any judicial review proceeding arising therefrom, whichever comes first.

5. If the Board retains the Confidential Information, it shall, in order to keep it confidential, treat the information in accordance with the procedure set forth at 49 CFR 1104.14.

6. If any party intends to use Confidential Information at hearings in this proceeding or in any related Board proceedings, or in any judicial review proceedings arising therefrom, the party shall submit any documents setting forth or revealing such Confidential Information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written request to the Board or the court (i) to restrict attendance at the hearing during discussion of such Confidential Information, and (ii) to restrict access to the portion of the record or briefs reflecting discussion of such Confidential Information in accordance with the Protective Order.

7. Any party that files with the Board a document containing Confidential Information must simultaneously file with the Board a public version of that document.

8. All parties must comply with all provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

UNDERTAKING

I, _____, have read the Protective Order governing the filing of Confidential Information by the South Dakota Department of Transportation (DOT) in STB Finance Docket No. 34794 and understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and preservation of evidence and argument in STB Finance Docket No. 34794 or any Board proceedings related thereto or any judicial review proceedings taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of this order and has executed an Undertaking in the form hereof.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking, and that DOT shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

Signature: _____

Position: _____

Affiliation: _____