

ORIGINAL

215272

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34794 ^{*/}

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

PETITION FOR STAY ^{**/}

ENTERED
Office of Proceedings
DEC 5 2005
Part of
Public Record

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John D. Fitzgerald

December 5, 2005

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

**/ Expedited handling requested inasmuch as the exemptions would otherwise become effective at 12:01 AM, Tuesday, December 6, 2005.

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34794

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

PETITION FOR STAY

Preliminary Statement

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), petitions the Surface Transportation Board (STB), that it stay the operation of the notice of exemption in F.D. No. 34794, by BNSF Railway Company (BNSF), and the related notices,^{2/} filed November 29, 2005, all to become effective December 6, 2005. The stay is

1/ General Chairman for United Transportation Union, on lines of BNSF Railway Company, with offices at 400 E. Evergreen Blvd., Vancouver, WA 98660.

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

necessary to enable examination and consideration of the terms of the so-called "settlement agreement" dated April 25, 2005, and as the same has been revised by a First Amendment to Settlement Agreement, together with the enumerated related notices of exemption filed contemporaneously with the instant notice of exemption, and other agreements not filed with the STB, and presently unavailable to the parties.

The verified statement of John D. Fitzgerald, is attached hereto in support of this stay request.

Unless the STB stays the eight notices of exemption, the transactions may be placed into effect on and after December 6, 2005.

REASONS FOR A STAY

A stay is required for a number of reasons.

1. Due Process. The voluminous nature of the material in the eight dockets, plus the need for discovery, mandate a stay to avoid a denial of due process. BNSF did not hand-deliver copies of its November 29 filing in F.D. No. 34794, and counsel for the seven related dockets did not effect any service upon this party. Further, the April 25, 2005 settlement agreement between BNSF and State of South Dakota was not furnished to counsel for Fitzgerald in unredacted form, despite execution of a highly confidential agreement in Finance Docket No. 34667.^{3/}

The STB in Finance Docket No. 34645. The Burlington Northern and Santa Fe Railway Company--Acquisition and Operation Exemption-

^{3/} The entire agreement was deemed highly confidential, with substantial portions redacted withheld, even under the confidentiality undertaking.

-State of South Dakota (served Jan. 14, 2005), ruled that BNSF's use of the line acquisition class exemption was improper inasmuch as this class exemption is reserved for uncomplicated and noncontroversial cases, and that the case is both complicated and controversial. Now, BNSF argues that it believes all opposition has been eliminated, thus eliminating controversy, (Finance Docket No. 34794, Notice, 2-3). Prior to its January 14, 2005 ruling, the STB issued a housekeeping stay on December 29, 2004.

However, here the public has not been advised of the eight filings, and the case is even more complicated than when the STB issued its January 14, 2005 decision.

UTU/GO-386 did not participate in discussions regarding an implementing agreement.^{4/} The STB's rules under the line acquisition require a formal 60 days' advance notice for transactions involving over \$5 million under the class exemption. 49 CFR 1150.32(e), 35(a). Indeed, UTU/GO-386 has not even received the mandatory 20 days advance notice under the N&W Trackage employee conditions.

Due process is not accorded by post-consummation proceedings in a complicated case under the acquisition class exemption. The STB ruled the class exemption procedure inappropriate in F.D. No. 34645, and should follow its earlier ruling.

2. Injury. BNSF employees likely will be subject to irreparable injury if the transactions are permitted to proceed without full knowledge of the scope of the transaction. Of course, the scope of the injury cannot be fully determined (or fully

^{4/} See: F.D. No. 34667, letter to STB Secretary Williams, filed Oct. 31, 2005.

estimated) without complete disclosure of information which continues to be withheld.

3. Success on Merits. It is impossible at this to determine the issues which will arise, and thus the probability of success on the merits.

4. No Injury to BNSF or South Dakota. A stay will not harm BNSF or South Dakota, or the various rail carriers filing the seven related notices of exemption. We are now advised by BNSF that consummation must occur before December 15, 2005. (Finance Docket No. 34794, Notice, 2 n.1). Earlier, BNSF advised closing must occur prior to October 25, 2005. See: Finance Docket No. 34467, BNSF Railway Company-Acquisition and Operation-State of South Dakota, 1 (served Oct. 6, 2005). It seems that the urgency of closing deadline is merely a threat for litigation purposes, and is not advanced in good faith. The case has been in process for over a year, and negotiations well before the one year.

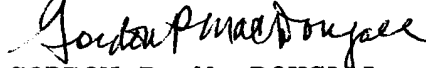
5. Stay Should Extend to All Dockets. The stay should extend to all eight notices, inasmuch as they are related. Each of the seven subsidiary notices state they will be withdrawn if the transaction in Finance Docket No. 34794 fails to occur, and Finance Docket No. 34794 is predicated upon the other notices.

CONCLUSION

The STB should stay the operation of the notice of exemption in Finance Docket No. 34794, and the notices in the related Finance Docket Nos. 34786, 34787, 34685 (Sub-No. 1), 34788, 34125 (Sub-No. 1), 34789, and 34790, until such time as UTU/GO-386 may

have an opportunity to be accorded a fair hearing, with discovery,
and an opportunity to submit comments and/or petitions.

Respectfully submitted,



GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John D. Fitzgerald

December 5, 2005

Certificate of service

I hereby certify I have served a copy Petition for Stay by
personal service upon Washington, DC counsel for BNSF, and by
first class mail upon all parties of record.^{5/}

Washington DC


Gordon P. MacDougall

^{5/} Telephone advice to counsel for State of South Dakota.

VERIFIED STATEMENT
OF JOHN D. FITZGERALD

My name is John D. Fitzgerald, with offices at 400 East Evergreen Boulevard, Vancouver, WA 98660. I serve as General Chairman for United Transportation Union, General Committee of Adjustment 386 (UTU/GO-386), for lines of BNSF Railway Company.

I commenced railroad service in September 1970 on Burlington Northern Railroad Company, predecessor of the present BNSF, and am a Conductor. I became a UTU Local Chairman in 1975, and Assistant General Chairman in 1981. I assumed my present position as General Chairman in August 1993, a full-time elective position, which I hold today.

My railroad experience, and duties with UTU over the years, have made me fully familiar with railroad operations throughout the BNSF system.

The BNSF so-called "Core Lines" in South Dakota are within the scope of UTU/GO-386 representation, as are several other BNSF lines in South Dakota, not embraced within the "core," including the BNSF East-West (former MILW) line through Aberdeen, the Britton line, among others. Our UTU/GO-386 committee assumed representation of persons employed on the core and other lines when BNSF's predecessor commenced operation in the 1980's. The principal train and engine service personnel are based at Sioux Falls and Aberdeen, SD, and at Sioux City, IA. I calculate that approximately 70 of my members stand to be affected by the restructuring proposals, but my knowledge is incomplete at this time.

1. I am very concerned about the restructuring of railroad operations in South Dakota. I filed comments in Finance Docket No. 34667, and since that proceeding was instituted in early 2005, I reviewed the filings as that case progressed. I corresponded with BNSF labor relations on the South Dakota restructuring proposals, and personally visited Fort Worth to review certain papers, and to make inquiries. However, there were no discussions concerning employee implementing agreements.

2. The filing of the notice in this proceeding, and those in the seven directly-related Finance Docket Nos. 34786, 34787, 34685 (Sub-No. 1), 34788, 34125 (Sub-No. 1), 34789, and 34790, all filed November 29, 2005, were not personally served upon my counsel, and were not made available to me until late Friday, December 2. Accordingly, I have not had an opportunity to adequately examine the various filings in these eight new proceedings.

3. In addition to the agreements accompanying the eight dockets, there are additional agreements, such as two haulage agreements, convertible to trackage rights between Mitchell-Aberdeen-Sioux City, and between Napa-Aberdeen-Sioux City, mentioned by counsel for South Dakota. (F.D. 34794, Notice, Ex. 3, p. 2). Moreover, I do not have a copy of the settlement agreement and the first amendment, redacted or otherwise, which makes any analysis difficult at this time.

4. Beyond the various agreements mentioned by BNSF and South Dakota, or included in the current filings, but not made available to me, according to my cursory review of the current filings, are such additional agreements as (1) supplement to grain

marketing agreement between DM&E and BNSF, (2) first amendment to interchange agreement between BNSF and Dakota Short Line, (3) second amendment to interchange and lease agreement between BNSF and Dakota Southern Ry., and (4) track improvement memorandum of agreement between South Dakota and BNSF.

5. The basic acquisition of lines by BNSF (Finance Docket No. 34794) is related to the remaining seven dockets; these other dockets are said to be contingent upon consummation of the transaction in Finance Docket No. 34794. However, it appears that the transactions in these other dockets could go forward, subject to divestment, even if Finance Docket No. 34794 is stayed. Accordingly, I ask that the entire "package" be stayed until I and other members of the public may have the opportunity to examine the filings, secure appropriate discovery, and learn all of the significant details, and to file comments or petitions. It is clear that BNSF railroad employees will be adversely affected by the transactions.

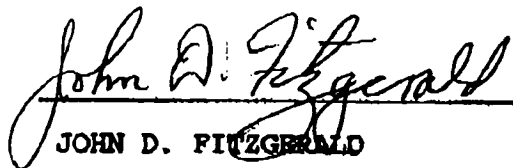
6. Although many of the transactions would be subject to mandatory employee protective conditions, such as N&W Trackage Rights, 354 I.C.C. 605 and 360 I.C.C. 653, I wish to point out that I have not received any required 20-day advance notice as provided by those conditions.

VERIFICATION

STATE OF WASHINGTON
COUNTY OF CLARK

Under the penalties of perjury, I affirm the foregoing is
true and correct as stated.

Dated at Vancouver
this 4th day of
December 2005


JOHN D. FITZGERALD