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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34794

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

JOINT REPLY IN OPPOSITION TO PETITION FOR STAY

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BNSF Railway Company (“BNSF”) and Sioux Valley Regional Railroad Authority, D&I Railroad Company, Mitchell-Rapid City Regional Railroad Authority, Dakota Southern Railway Company, State of South Dakota, by and through its Department of Transportation, Dakota, Minnesota & Eastern Railroad Corporation, and Iowa, Chicago & Eastern Railroad Corporation (collectively, “State Applicants”) jointly respond to the Petition for Stay filed by John D. Fitzgerald on December 5, 2005, in the above-captioned proceeding and related proceedings.¹ In his Petition, Mr. Fitzgerald seeks to stay the Verified Notice of Exemption filed by BNSF on November 29, 2005, as well as the related Verified Notices of Exemption filed by the State

¹ Related proceedings were filed in 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 (“Related Proceedings”).

Applicants on the same date. He asserts that the stay is necessary to enable the examination and consideration of the terms of the April 25, 2005 Settlement Agreement entered into between BNSF and the State of South Dakota, as amended, together with the related settlement implementing agreements which are the subject of notices of exemption filed in the Related Proceedings and other agreements not filed with the Board. Mr. Fitzgerald seeks expedited handling of his petition in as much as the exemptions would otherwise become effective at 12:01 a.m. on Tuesday, December 6, 2005.

The Board should deny Mr. Fitzgerald's Petition. First, Mr. Fitzgerald and his attorney have had access to the Settlement Agreement and the related Notices of Exemption and other documents. In particular, Mr. Fitzgerald's counsel was provided with a redacted version of the Settlement Agreement on October 11, 2005, by counsel for BNSF. At that time, BNSF's counsel advised Mr. Fitzgerald's counsel that, if he wanted to examine an unredacted version of the Settlement Agreement, arrangements could be made. Further, on Monday, November 28, 2005, Mr. Fitzgerald himself met with BNSF's in-house counsel and a BNSF labor relations representative in Fort Worth concerning the subject transactions. At that meeting, BNSF representatives outlined the terms of the Settlement Agreement and all implementing agreements with Mr. Fitzgerald and answered questions related thereto. Thereafter, Mr. Fitzgerald was provided with full access and an opportunity to review (but not copy) an unredacted copy of the Settlement Agreement, as amended, along with all implementing agreements related thereto, including, without limitation, all agreements which are the subject of this proceeding and the Related Proceedings. Additionally, he was advised by BNSF's in-house counsel that the various notices of exemption were to be filed with the STB the next day.

Subsequently, on Tuesday, November 29, 2005, BNSF's Verified Notice of Exemption was filed with the STB. A copy of the Notice was sent by overnight delivery to Mr. Fitzgerald's counsel who received it at 10:04 a.m. on Wednesday, November 30, 2005. The State's letter of support, which was attached as Exhibit 3 to BNSF's Verified Notice of Exemption, identified the seven related Notices filed by the State Applicants in the Related Proceedings, and thus Mr. Fitzgerald's counsel was on notice on the morning of November 30, 2005, that the related Notices had been filed. Mr. Fitzgerald's counsel could have at that time contacted counsel for the State Applicants and requested copies of the seven Notices filed by the State Applicants, but he did not do so. In addition, notice of availability of all of those Notices along with redacted versions of the underlying trackage rights and other agreements have been posted on the STB's website.

Accordingly, Mr. Fitzgerald's assertion that he and his counsel have not had an opportunity to review the relevant agreements is unfounded and provides no basis for the granting of the requested Petition for Stay.

Further, the granting of a petition for stay would serve no purpose. As set forth in BNSF's Notice, no employees will be affected by BNSF's acquisition and operation of the Core Lines since BNSF operations on the Lines will not change. See BNSF Verified Notice of Exemption at 5. In addition, the State Applicants in the Related Proceedings have all expressed their consent to the granting of protective conditions under Norfolk and Western Ry. Co. – Trackage Rights – Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry. Inc. – Lease and Operate, 260 I.C.C. 653 (1980).

Finally, Mr. Fitzgerald has failed to meet the applicable legal standard for the granting of a stay. Specifically, the burden of persuasion on each element of the Holiday Tours criteria lies

with the party seeking the relief of a stay. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974); Sault Ste. Marie Bridge Company -- Acquisition and Operation Exemption -- Lines of Union Pacific Railroad Company, Finance Docket No. 33290 (STB served January 24, 1997). The threat of harm warranting a stay must be both irreparable and imminent: "A claim of speculative harm is not enough to support relief. The party seeking a stay is required to demonstrate that the injury is imminent, certain and great." Consolidated Rail Corporation -- Abandonment -- Between Corry and Meadville, in Erie and Crawford Counties, PA, Docket No. AB-167 (Sub-No. 1139) (ICC served October 5, 1995) at 7 (internal quotations omitted).

Here, as indicated, there will be no change in BNSF's existing operations on the Core Lines, and no adverse impacts on BNSF employees arising from the Core Lines sale. Standard Norfolk & Western conditions apply to the trackage rights exemptions filed in the Related Proceedings and will fully protect BNSF employees (including the 20-day notice provisions) if trackage rights operations actually result in adverse labor impacts. Moreover, the proposed transactions are plainly not anti-competitive, which would be the only basis for revoking the exemptions under 49 U.S.C. § 10502. Minnesota Comm. Ry., Inc. -- Trackage Exempt. -- BN RR. Co., 8 I.C.C.2d 31, 37 (1991). Mr. Fitzgerald does not claim otherwise, nor could he. Indeed, despite having all of the information on the proposed transactions required by the Board's regulations, as well as ample opportunity to review the redacted Settlement Agreement between the parties as well as the opportunity to review the entirety of the Settlement Agreements and implementing agreements, Mr. Fitzgerald makes no arguments on his likelihood of success on the merits, and indeed gives no inkling of what his revocation arguments would be. Mr. Fitzgerald apparently wants to go fishing for a case in the meantime, but that is no basis for a stay under the well-established Holiday Tours criteria.

CONCLUSION

For the reasons set forth above, Mr. Fitzgerald's Petition for Stay should be denied.

Respectfully submitted,

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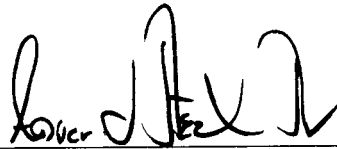
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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2005, a true and correct copy of the foregoing Joint Reply in Opposition to Petition for Stay was served by hand delivery on Gordon P. MacDougall and by first-class mail, postage prepaid on all other Parties of Record.



Robert J. Kelly