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SERVICE DATE – AUGUST 14, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35044

BUFFALO & PITTSBURGH RAILROAD, INC.–  
LEASE AND OPERATION EXEMPTION–  
NORFOLK SOUTHERN RAILWAY COMPANY

Decided: August 8, 2007

By petition filed on July 3, 2007, Buffalo & Pittsburgh Railroad, Inc. (BPRR), a Class II rail carrier, seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10902 to lease and operate approximately 35.9 miles of a line of railroad owned by the Norfolk Southern Railway Company (NSR). The rail line extends from milepost BR 8.8 near Gravity, NY, to milepost BR 44.7+/-, immediately south of the northbound home signal and insulated joint for CP-Machias, near Machias, NY.

Petitioner has requested expedited consideration of the petition so that the exemption would become effective upon completion of the 60-day notice period following the filing of its labor notice certification pursuant to 49 CFR 1121.3(h). We will grant the exemption, subject to labor protective conditions, and provide for the exemption to become effective upon completion of the 60-day notice period.

BACKGROUND

BPRR currently operates over the line via overhead trackage rights, connecting its existing line south of Machias with its yard and other operations in Buffalo, NY.<sup>1</sup> The petition indicates that NSR is not currently using the line to operate through trains, and that there is only a minimal amount of local traffic on the line. As the most active carrier currently using the line, BPRR states that it is willing to pay the costs to maintain the line, but only if it gets to control

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<sup>1</sup> BPRR acquired the overhead trackage rights from Consolidated Rail Corporation (Conrail) in 1997. See Buffalo & Pittsburgh Railroad Inc.–Trackage Rights Exemption–Consolidated Rail Corporation, STB Finance Docket No. 33514 (STB served Dec. 4, 1997). According to BPRR, NSR succeeded to the rights and obligations of Conrail under the trackage rights agreement, as part of the acquisition and division of Conrail.

operations over the line. The proposed lease will also enable BPRR to provide local service to shippers, while continuing its overhead service to and from Buffalo.

The proposed lease agreement extends for a term of 20 years, with a renewal period of 10 years, subject to the right of either party to terminate as provided in the lease. BPRR states that its trackage rights would be suspended while the lease is in effect, but would be reactivated if and when the lease terminates. The lease agreement also permits NSR to retain detour rights over the line pursuant to a standard form detour agreement adopted by the Association of American Railroads.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10902, the lease and operation of a rail line by a Class II carrier would require an application to, and authorization by, the Board. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation if we find that: (1) 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 limited in scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

An exemption from the prior approval requirements of 49 U.S.C. 10902 is consistent with the standards of 49 U.S.C. 10502. Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. An exemption from the application process will minimize the need for Federal regulatory control [49 U.S.C. 10101(2)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], reduce regulatory barriers to entry into and exit from the rail industry [49 U.S.C. 10101(7)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of this transaction is not needed to protect shippers from the abuse of market power. The lease will benefit shippers by enabling BPRR, which already operates over the line, to coordinate local service to shippers with its existing overhead service. BPRR will be able to maintain the line to ensure continued efficient service and, as a locally based carrier, will be in a better position to develop local business on the line. 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 rail carrier of its statutory obligation to protect the interests of adversely affected employees. Section 10902(d) provides for labor protection in line acquisitions by Class II rail carriers. As a condition to this exemption, any employees affected by the acquisition will be protected as required by section 10902(d), subject to the standards and procedures established in Wisconsin Central Ltd.—Acquisition Exem.—Union Pac. RR, 2 S.T.B. 218 (1997), aff'd in relevant part sub nom. Association of American Railroads v. STB, 162 F.3d 101 (D.C. Cir. 1998). As required by 49 CFR 1121.4(h), BPRR has certified to the Board that it has posted a notice of the transaction at the workplace of potentially affected employees and served the same on the national

organizations representing them. BPRR has made its certification 60 days prior to the August 27, 2007 effective date set for this decision, and therefore the requirements of section 1121.4(h) will have been met for the exemption to be effective on that date.<sup>2</sup>

This transaction is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) because it will not result in a significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 CFR 1105.8(b)(1) because it will not substantially alter railroad properties.

In requesting expedited consideration, BPRR asks that the exemption be effective upon completion of the 60-day notice period required under section 1121.4(h), which would be on August 27, 2007. BPRR states that expedited closing of the transaction will enable it to perform planned maintenance during the current construction season. The request is reasonable. Accordingly, this decision is being issued on an expedited basis, and the exemption will become effective on August 27, 2007, rather than the normal 30 days after service of the decision and publication in the Federal Register.

This action 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 , the above-described transaction is exempted from the prior approval requirements of 49 U.S.C. 10902, subject to the employee protective conditions implementing 49 U.S.C. 10902(d) as provided in this decision.
2. Notice will be published in the Federal Register on August 14, 2007.
3. The exemption will become effective on August 27, 2007.

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<sup>2</sup> On June 28, 2007, BPRR certified that it had posted notice and served copies on the national offices of affected labor unions. In a supplemental filing dated July 2, 2007, BPRR certified that it had also served copies of the notice on individual communication and signal workers. BPRR's June 28, 2007 certification satisfies the Board's notice requirements, and the 60-day notice period will have run by August 27, 2007.

4. Petitions to stay must be filed by August 21, 2007. Petitions to reopen must be filed by September 4, 2007.

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

Vernon A. Williams  
Secretary