

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34645

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
— ACQUISITION AND OPERATION EXEMPTION —
STATE OF SOUTH DAKOTA

Decided: January 14, 2005

We are rejecting the § 1150.31 exemption notice filed in this proceeding by The Burlington Northern and Santa Fe Railway Company (BNSF). Our rejection of the exemption notice moots the stay petition filed by the State of South Dakota (the State).

BACKGROUND

The Core Lines. This proceeding concerns certain State-owned railroad lines (referred to as the “Core Lines”) that are the subject of a 1986 Operating Agreement between a BNSF predecessor (Burlington Northern Railroad Company) and the State. 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, in 1980, received approval to abandon the Core Lines. In 1981, the abandoned Core Lines were acquired by the State. Since then, BNSF 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 Exemption Notice. On December 23, 2004, BNSF, a Class I rail carrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire and operate the Core Lines. BNSF contends that, pursuant to the terms of its agreements with the State, it has an option to purchase the Core Lines. BNSF notes that, although it is clearly a rail carrier, it used the notice of exemption procedures at 49 CFR Part 1150, Subpart D, which are applicable to 49 U.S.C. 10901 acquisitions by noncarriers. BNSF argues that, because the Core Lines were abandoned by the Milwaukee Road, they are no longer subject to the Board’s jurisdiction, and, therefore, the acquisition and operation of the Core Lines by a rail carrier is subject to the prior approval requirements of 49 U.S.C. 10901 rather than those of 49 U.S.C. 11323 (governing line sales between carriers). Because its operations over the Core Lines will not change as a result of taking legal title, BNSF asserts that no employees will be adversely affected by this transaction.

Contractual Dispute. BNSF has advised that it has a contractual dispute with the State which is now the subject of litigation in The Burlington Northern and Santa Fe Railway Company v. State of South Dakota, Civ. No. 04-470 (S.D. 6th Circuit). BNSF acknowledges that, before it can actually acquire title to the Core Lines, it will need to prevail in acquiring the Core Lines from the State, whether through voluntary conveyance by the State or involuntary conveyance as may be ordered by the state court. BNSF seeks the Board's permissive authority to acquire and operate the Core Lines in response to the State's argument, made in the state court proceeding, that, because BNSF has not received Board authority to acquire the Core Lines, BNSF has no right to exercise the purchase option. The state court has set trial for September 2005.

The State's Stay Petition. On December 29, 2004, the State filed a petition seeking a stay of the notice of exemption filed in this proceeding by BNSF, pending resolution of the State's forthcoming petition to partially revoke or reject the notice. BNSF replied by letter on December 29, 2004, arguing that any remedial action, should it be necessary, can be taken after the effective date of its notice of exemption. On December 29, 2004, the Board issued a "housekeeping stay" of the effective date of BNSF's notice of exemption, to allow BNSF an opportunity to file a formal reply to the stay petition, and to allow time for the Board to consider, in a more orderly fashion, the issues presented in the stay petition. On January 7, 2005, BNSF filed a supplemental reply to the stay petition. On January 12, 2005, the State filed a response, again urging that the exemption be stayed pending resolution of revocation proceedings. The State also filed, on January 12, 2005, a letter from South Dakota Governor M. Michael Rounds, who also urges the Board to stay the exemption until it rules on the State's forthcoming petition for partial revocation. On January 14, 2005, the State filed a similar letter signed by the members of the South Dakota Congressional delegation (U.S. Senator Tim Johnson, U.S. Senator John Thune, and U.S. Representative Stephanie Herseth).

DISCUSSION AND CONCLUSIONS

We will reject the exemption notice filed by BNSF because the transaction contemplated by BNSF (i.e., the transfer of the Core Lines from "modified certificate" status to § 10901 "railroad line" status) is not appropriate for consideration under the "class exemption" procedure that BNSF invoked when it filed its § 1150.31 exemption notice. That procedure is typically reserved for uncomplicated and noncontroversial cases. This case, however, is both complicated and controversial.

As we have explained in prior cases, *see, e.g., Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket No. 33980, slip op. at 6-10 (STB served Feb. 15, 2002), the § 1150.31 class exemption typically applies to "routine" transactions that are not subject to substantial controversy and opposition. The facts and issues presented in the pleadings filed to date regarding BNSF's notice of

exemption, combined with the fact that this transaction is now tied up in state court litigation respecting BNSF's rights under the 1986 Operating Agreement, indicates that the transaction contemplated by BNSF is not "routine" or "noncontroversial" either. Finally, the competitive issues that the State has indicated it may raise before the Board cannot be regarded as "uncomplicated."

Under these circumstances, we will reject the § 1150.31 exemption notice filed by BNSF and direct BNSF to file either a § 10502 exemption petition or a formal § 10901 application, so that we will be able to compile a record that will allow us to resolve the issues raised. We expect that BNSF will file, as soon as possible, either a petition or an application, and we also expect that this filing will include BNSF's entire "case in chief." We further expect that the State will submit its reply to this filing no later than the 21st day after the date on which the filing is made, and we also expect that this submission will include the State's entire case. We also expect that BNSF will submit its response to the State's reply no later than the 14th day after the date on which the reply is filed. And we will make every effort to issue a decision in this matter well in advance of the trial in the state court proceeding.

We expect that BNSF and the State will inform us if it appears the state court will issue any dispositive order in advance of the trial date. In that event, we will make every effort to issue our decision as expeditiously as possible.

Finally, it is important to note that the ongoing litigation in the state court involves a contractual dispute respecting the scope of the rights retained by or granted to the State and/or BNSF under the 1986 Operating Agreement. The State apparently contends that the 1986 Operating Agreement gives BNSF no "purchase option" right to acquire the Core Lines and/or gives the State a right to grant other entities trackage rights to operate over the Core Lines. BNSF apparently contends that the 1986 Operating Agreement gives BNSF a "purchase option" right to acquire the Core Lines but gives the State no right to grant other entities trackage rights to operate over the Core Lines. In this decision, the Board has made no determination, one way or the other, concerning the existence or scope of any rights retained by or granted to the State and/or BNSF under the 1986 Operating Agreement. The contractual dispute respecting the existence and scope of any such rights must be resolved in a court of competent jurisdiction.

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

It is ordered:

1. The § 1150.31 exemption notice filed in this proceeding by BNSF is rejected.

2. The stay petition filed in this proceeding by the State of South Dakota is dismissed as moot.

3. If BNSF intends to pursue the transaction contemplated by its exemption notice, it should submit, as soon as possible, either a § 10502 petition or a § 10901 application. The State should submit its reply to this filing no later than the 21st day after the date on which the filing is made. BNSF should submit its response to the State's reply no later than the 14th day after the date on which the reply is filed.

4. This decision is effective on its service date.

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

Vernon A. Williams
Secretary