

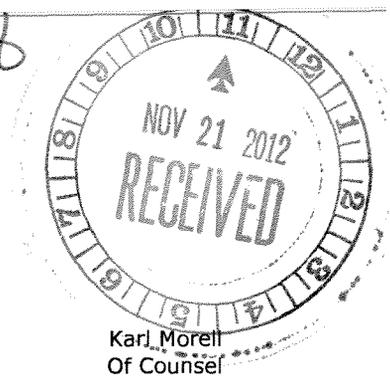


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November 21, 2012

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Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

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SURFACE
TRANSPORTATION BOARD

Re: Finance Docket No. 35689, BNSF Railway Company -- Lease Exemption ---
Norfolk Southern Railway Company

EXPEDITED HANDLING REQUESTED

Dear Ms. Brown:

Attached for filing are the original and ten copies of a Petition for Exemption under 49 C.F.R § 1121, a disc containing the Petition and a check covering the \$6,800 filing fee.

Please time and date stamp the extra copy of the Petition and return it with our messenger.

If you have any questions, please contact me.

Sincerely,

Karl Morell
Of Counsel

Enclosure

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SURFACE
TRANSPORTATION BOARD

BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35689

BNSF RAILWAY COMPANY
--LEASE EXEMPTION--
NORFOLK SOUTHERN RAILWAY COMPANY

PETITION FOR EXEMPTION

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Attorneys for:
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Dated: November 21, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35689

BNSF RAILWAY COMPANY
--LEASE EXEMPTION--
NORFOLK SOUTHERN RAILWAY COMPANY

PETITION FOR EXEMPTION

BNSF Railway Company (“BNSF”) hereby petitions the Surface Transportation Board (“Board”) for an exemption from prior review and approval under 49 U.S.C. §§ 11323-25 of BNSF’s lease of an approximately 1.2-mile rail line owned by Norfolk Southern Railway Company (“NSR”) in Chicago, Illinois.

BACKGROUND

BNSF seeks to lease from NSR the approximately 1-mile rail line and rail corridor located between W. 23 Street on the northern end and a point approximately 600 feet north of the Chicago SAG Canal on the southern end in Chicago, Illinois (the “Line”). The Line runs parallel to Western Avenue on east side of the Line and parallel to Rockwell Street on the west side of the Line. A map of the Line is attached as Exhibit 1. The tracks currently located in the corridor are not operable. BNSF intends to remove and replace the existing tracks and upgrade the Line to Federal Railroad Administration Class II standards. There are no customers located along the Line. NSR will retain overhead trackage rights over the Line.¹

¹ The Lease and Option to Purchase Agreement (“Lease Agreement”) grants BNSF the option to acquire the Line. Should BNSF exercise that option, BNSF will seek separate authority from the Board to acquire the Line. The Lease Agreement does not contain an interchange commitment.

BNSF's lease and rehabilitation of the Line is an important precursor to the projects included in the Chicago Region Environmental and Transportation Efficiency Program ("CREATE"). CREATE is a public-private partnership between the Chicago Department of Transportation, the Illinois Department of Transportation, and the American Association of Railroads, including Metra and the freight railroads operating in Chicago, to increase efficiency of the region's rail infrastructure and enhance the quality of life for Chicago area residents.² BNSF's lease and rehabilitation of the Line will provide a new connection between major freight yards and main line tracks, which will reduce congestion and delays and add capacity to the rail freight infrastructure.

EXPEDITED HANDLING REQUESTED

The rehabilitation of the Line and other CREATE improvements are scheduled to start early next year. In order for BNSF to commence work on the Line it must consummate the lease transaction with NSR. Consequently, BNSF respectfully urges the Board to expedite the processing of this Petition so that the project can be completed on a timely basis.

ARGUMENT

THE PROPOSED TRANSACTION SHOULD BE EXEMPTED FROM THE PRIOR APPROVAL REQUIREMENTS OF 49 U.S.C. §§ 11323-25.

Under 49 U.S.C. § 11323(a)(2), prior Board approval is required for a rail carrier to lease property of another rail carrier.

Pursuant to 49 U.S.C. § 10502, however, the Board must exempt a transaction from regulation when it finds that:

- (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and
- (2) either:

² <http://www.createprogram.org>

- (a) the transaction is of limited scope, or
- (b) regulation is not necessary to protect shippers from the abuse of market power.

The legislative history of Section 10502 reveals a clear Congressional intent that the Board should liberally use its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. In enacting the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress encouraged the Board's predecessor to liberally use the expanded exemption authority under former Section 10505:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation.

H.R. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980). *See also Exemption From Regulation - Boxcar Traffic*, 367 I.C.C. 424, 428 (1983), *vacated and remanded on other grounds, Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984). Congress reaffirmed this policy in the conference report accompanying the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which re-enacted the rail exemption provisions as Section 10502. H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69 (1995).

In reviewing an exemption petition under Section 10502, the Board does not undertake a broader analysis than it would apply to a transaction under the statutory provision that would apply in the absence of the exemption. *Blackstone Capital Partners – Control Exemption – CNW Corp.*, 5 I.C.C.2d 1015, 1019 (1989)(“*Blackstone*”); *Vill. of Palestine v. I.C.C.*, 936 F. 2d 1335 (D.C. Cir. 1991).

The proposed transaction does not involve the merger or control of at least two Class I rail carriers. Therefore, absent an exemption, the proposed transaction would be subject to Board review under the standards set forth in 49 U.S.C. § 11324(d). Section 11324(d) provides that the Board “shall approve” the transaction unless it finds both that:

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11324(d).

In transactions subject to Section 11324(d), the primary focus is on the probable competitive effects of the proposed transaction. *See, e.g.*, Finance Docket No. 32579, *Canadian Pac. Ltd., and Soo Line R.R. Co. - Control - Davenport, Rock Island & N. W. Ry.* (served February 10, 1995), slip op. at 5; *Wilmington Terminal R.R., Inc. - Purchase & Lease - CSX Transp., Inc.*, 6 I.C.C. 2d 799, 803 (1990), *pet. for review denied sub nom., Ry. Labor Executives' Ass'n v. ICC*, 930 F.2d 511 (6th Cir. 1991). The public interest factors are considered only where significant anticompetitive effects are found. *Id.*

A finding of competitive harm under Section 11324(d)(1) must be grounded on a showing that any adverse competitive effects are both “likely” and “substantial.” *Wisc. Cent. Transp. Corp. – Continuance in Control – Fox Valley & W. Ltd.*, 9 I.C.C.2d 233, 238 (1992). Examples of adverse competitive impacts that would trigger the balancing of the public interest factors under Section 11324(d)(2) “would be the likelihood of significantly higher rates or significantly worsened service, or the likelihood of a combination of the two.” *Blackstone*, at 1019 (footnote omitted). Even if such showings were made, the proposed transaction may not be

disapproved unless the anticompetitive effects of the proposed transaction outweigh the public interest factors. *See* Finance Docket No. 31991, *CSX Corp., CSX Transp., Inc. and Carrollton R.R. - Control - Transkentucky Transp. R.R.* (not printed), served April 15, 1991, slip op. at 2.

The lease of a rail line by one rail carrier from another rail carrier does not result in harm to competition unless the acquisition creates or enhances the ability of the lessee carrier to exercise market power. The Board and its predecessor have defined market power as the ability of a carrier profitably to increase rates above competitive levels or to reduce the quality of service for a significant period of time without losing traffic to competing carriers or other sources. *See, e.g., CSX Corp. - Control - Am. Commercial Lines*, 2 I.C.C.2d 490, 515 (1984), *pet. for review denied sub nom., Crouse Corp. v. ICC*, 781 F.2d 1176 (6th Cir.), *cert. denied*, 479 U.S. 890 (1986). In addition, only competitive harm that is directly and causally related to a proposed transaction -- and not pre-existing conditions -- are considered by the Board in determining whether a transaction will lessen competition. *Burlington N. R.R. Co. - Control and Merger - The Atchison, Topeka and Santa Fe Ry. Co.*, 10 I.C.C.2d 661, 728 (1995).

As is demonstrated in this Petition, there are no anticompetitive effects that flow from the proposed transaction. The proposed transaction will not lead to higher rates or worsened service. To the contrary, the proposed transaction will improve the operating efficiencies of railroads in the Chicago region.

A. Regulation Of The Proposed Transaction Is Not Necessary To Carry Out The Rail Transportation Policy.

Detailed scrutiny of the proposed transaction under 49 U.S.C. §§ 11323-25 is not necessary to carry out the Rail Transportation Policy ("RTP"). By minimizing the administrative expense of considering the proposed transaction, the requested exemption will expedite regulatory decisions and reduce barriers to entry and exit [49 U.S.C. §§ 10101(2) and (7)].

The lease of the Line is part of CREATE and will improve operating efficiencies in the Chicago area. Consequently, the proposed transaction will help promote a safe and efficient rail transportation system [49 U.S.C. § 10101(3)], ensure the continuation of a sound rail transportation system with effective competition among rail carriers [49 U.S.C. § 10101(4)], foster sound economic conditions in transportation and ensure effective competition [49 U.S.C. § 10101(5)], encourage honest and efficient management [49 U.S.C. § 10101(9)], and promote energy conservation [49 U.S.C. § 10101(14)]. Other aspects of the RTP will not be adversely affected.

B. The Proposed Transaction Is Of Limited Scope.

BNSF is leasing a 1.2-mile rail line from NSR. The Board and its predecessor have found the acquisition and operation of much greater lengths of rail line to be limited in scope. *See, e.g., Ind. R.R. Co. – Acquisition & Operation – Ill. Cent. R.R. Co.*, 6 I.C.C.2d 1004, 1011 (1990)(acquisition of 90.3 miles of rail line found limited in scope); Finance Docket No. 31482, *Mid Michigan R.R. Co. – Purchase Exemption – The St. Joseph & Grand Island R.R. Co. Line Between St. Joseph, MO and Upland, KS* (not printed), served August 7, 1989 (acquisition of 107.3 miles of rail line found limited in scope); Finance Docket No. 32149, *Genesee & Wy. Indust., Inc. – Continuance in Control Exemption – Allegheny & E. R.R., Inc.* (not printed), served October 23, 1992 (acquisition of control of carrier operating 147.1 miles of rail line and serving 8 customers found limited in scope).

C. Regulation Of The Proposed Transaction Is Not Necessary To Protect Shippers From An Abuse Of Market Power.

Even if the proposed transaction were not limited in scope, the transaction should nevertheless be exempted because the transaction will not result in any abuse of market power by

BNSF. There are no shippers located on the Line. Thus, there will be no loss of rail competition. The proposed transaction is intended simply to improve the operating efficiencies of BNSF, NSR and the other railroads with rail lines adjacent to the Line. Consequently, the proposed transaction will not result in an abuse of market power. See STB Finance Docket No. 33609, *Norfolk S. Ry. – Purchase Exemption – Union Pac. R.R. Co.* (not printed), served October 29, 1998, slip op. at 3 (finding no anticompetitive effect where “transaction represents only a change in owners”); Finance Docket No. 31469, *S.C. Cent. R.R. – Purchase – CSX Transp., Inc. Line Between E. Greenville and Laurens, SC* (not printed), served July 30, 1990, slip op. at 3 (finding no anticompetitive effect where the number of competitive alternatives available to shippers remains unchanged). Since there are no shippers on the Line there can be no adverse change in competition. Accordingly, regulation is not necessary to protect shippers from an abuse of market power.

III. LABOR PROTECTION.

Under 49 U.S.C. § 10502(g), the Board may not use its exemption power to relieve a rail carrier of its statutory obligation to protect the interests of employees. Therefore, as a condition to granting the exemption, BNSF has no objection to the Board imposing the employee protective conditions set forth in *Mendocino Coast Ry., Inc. – Lease and Operate*, 354 I.C.C. 732 (1978), as modified at 360 I.C.C. 653 (1980).

IV. ENVIRONMENTAL AND HISTORIC IMPACTS.

BNSF is leasing the Line for continued rail operations. Further Board approval is required for BNSF to discontinue any service and there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older. Hence, this Petition for Exemption does not require an historic report under 49 C.F.R. § 1105.8(b)(1).

BNSF's lease of the Line will not result in significant changes in carrier operations. There will not be a diversion of: (1) more than 1,000 rail carloads a year to motor carriage; or (2) an average of 50 carloads per mile per year for any part of this line to motor carriage. This transaction will not result in: (1) an increase in rail traffic of at least 100 percent or an increase of at least eight trains a day on any segment of the line; (2) an increase of rail yard activity of at least 100 percent; or (3) an average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day. The thresholds of 49 C.F.R. § 1105.7(e)(5)(ii) will not be exceeded. Finally, the transportation of ozone depleting materials is not contemplated. Therefore, no environmental documentation is required under 49 C.F.R. § 1105.6(c)(2).

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

CONCLUSION

Regulation of the proposed transaction is not necessary to carry out the RTP. Also, the proposed transaction is limited in scope. Furthermore, regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. Consequently, BNSF respectfully requests that the Board exempt from the prior approval requirement the proposed lease by BNSF of the Line and to grant such exemption expeditiously.

Respectfully submitted,

A handwritten signature in cursive script that reads "Karl Morell". The signature is written in black ink and is positioned above a horizontal line.

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Dated: November 21, 2012