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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-933 SUB-NO. 1X

DAKOTA, MISSOURI VALLEY AND WESTERN RAILROAD, INC.
DISCONTINUANCE EXEMPTION
IN BURKE COUNTY, NORTH DAKOTA

ENTERED
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Public Record

PETITION FOR EXEMPTION

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Railroad, Inc.

Dated: August 29, 2014

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Surface Transportation Board

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IN BURKE COUNTY, NORTH DAKOTA

PETITION FOR EXEMPTION

Dakota, Missouri Valley and Western Railroad, Inc. (“DMVW”) petitions the Surface Transportation Board (“Board”) to exempt, under 49 U.S.C. § 10502, 49 CFR Part 1121, and 49 CFR Part 1152, Subpart G, DMVW’s discontinuance of service over approximately 27 miles of rail line in Burke County, North Dakota from the prior approval requirements of 49 U.S.C. § 10903.

I. PROPOSED TRANSACTION

DMVW seeks an exemption from the Board to discontinue service over two rail lines: the approximately 17-mile rail line between milepost 541.0 at Flaxton, ND and milepost 549.64 at Rival, ND; milepost 549.64 at Rival, ND and milepost 550.8 at Lignite Junction, ND; and milepost 550.8 at Lignite Junction, ND and milepost 558.0 near Stampede, ND (the “Flaxton-Stampede Line”); and the approximately 9.96-mile rail line between milepost 550.8 (previously BNSF milepost 56.96) at Lignite Junction, ND east past Lignite to the end of Soo Line Railroad Company d/b/a Canadian Pacific Railway Company’s (“CP”) ownership, previously BNSF

milepost 47 (the “Lignite Line”).¹ The Flaxton-Stampede Line and Lignite Line (collectively, the “Lines”) share a common point at Lignite Junction, and are owned by CP.

DMVW had been operating over the Flaxton-Stampede Line since 1990 pursuant to leases and trackage rights from CP. DMVW had been operating over the Lignite Line since 2007 pursuant to a lease from CP. CP has terminated DMVW’s lease rights over the Lines and will provide common carrier rail service over the Lines.

A map of the Lines is attached as Exhibit A.

The Lines traverse through United States Postal Service ZIP Codes 58737, 58722, 58752, 58727, and 58721, in Burke County, North Dakota. To the best of DMVW’s knowledge, neither Line contains federally granted rights-of-way. Any documentation in DMVW’s possession relating to such rights-of-way will be made available promptly to those requesting it.

A draft Federal Register notice is attached as Exhibit B. Pursuant to 49 CFR § 1105.12, notice of the discontinuance was published on August 18, 2014, in the Minot Daily Times, a newspaper of general circulation in Burke County, North Dakota. A copy of the notice is attached as Exhibit C.

II. BACKGROUND

DMVW leased and operated the Lines pursuant to a Renewed Leased Lines Agreement (“Lease”) between DMVW and CP that was executed in 2006 and amended in 2007. DMVW originally operated over a portion of the Lines pursuant to a lease and trackage rights that it

¹ Because this petition relates to a discontinuance of service rather than an abandonment, the Board typically does not consider Offers of Financial Assistance under 49 U.S.C. §10904 for acquisition of the Lines, trail use requests under 16 U.S.C. §1247(d), or requests under 49 U.S.C. §10905 to negotiate for public use of the Lines. See *Progressive Rail Inc.—Discontinuance of Service Exemption—In Barron County, WI*, STB Docket No. AB-1101X (STB served July 25, 2012); *Mfrs. Ry.—Discontinuance Exemption—In St. Louis County, MO*. STB Docket No. AB-1075X (STB served July 12, 2011); and *Northern Lines Railway, LLC—Discontinuance of Service Exemption- In Stearns County, MN*, STB Docket No. AB-1011 (Sub-No. IX) (STB served May 20, 2011).

obtained from CP. On September 19, 1990, DMVW filed a Notice of Exemption to lease from CP and operate over the rail line between approximately milepost 541.0 near Flaxton, ND and approximately milepost 549.64 at Rival, ND, and for trackage rights between approximately milepost 549.64 at Rival, ND and approximately milepost 582.3 at Crosby, ND.² On July 27, 2007, DMVW filed a Notice of Exemption to lease from CP and operate over the rail line between approximately milepost 549.64 at Rival, ND and milepost 550.8 at Lignite Junction, ND, between approximately milepost 550.8 at Lignite Junction, ND and milepost 582.3 at Crosby, ND, and between approximately BNSF milepost 47.0 east of Lignite and BNSF milepost 56.96 at Lignite Junction, ND.³

In June 2014, CP notified DMVW that it was removing the Lines from the Lease so that CP could take over common carrier operations on the Lines. Pursuant to the amended Lease, DMVW retains rights to operate over the Lines for the sole purpose of exchanging railcars with CP at Flaxton, ND. Therefore, in order to facilitate DMVW and CP's recent amendment to their Lease, DMVW seeks authority from the Board to discontinue service over the Lines under the Lease. CP will provide all common carrier operations over the Lines. No shipper will lose railroad service as a result of this transaction.

III. ARGUMENT SUPPORTING THE DISCONTINUANCE OF SERVICE

Because the parties have agreed to terminate the Lease, DMVW requests that the Board exempt the proposed discontinuance under 49 U.S.C. § 10502 from the applicable requirements of 49 U.S.C. § 10903.

² See Finance Docket 31720, Dakota, Missouri Valley and Western Railroad, Inc.—Lease and Operation Exemption--Soo Line Railroad Company (ICC served Sept. 19, 1990).

³ See Finance Docket 35055, Dakota, Missouri Valley and Western Railroad, Inc.—Lease and Operation Exemption--Soo Line Railroad Company d/b/a Canadian Pacific Railway (STB served July 27, 2007).

The Board has jurisdiction over the proposed discontinuance pursuant to 49 U.S.C. § 10903. Under 49 U.S.C. § 10903, a rail carrier generally needs the Board's approval for a discontinuance of service over a rail line. Under 49 U.S.C. § 10502, 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:

(a) the transaction is of limited scope, or

(b) regulation is not necessary to protect customers 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 Rail Act of 1980, Pub. L. No. 96-488, 94 Stat. 1895, Congress encouraged the Board's predecessor agency 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 provision as Section 10502. H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69 (1995).

A. The Application of 49 U.S.C. § 10903 Is Not Necessary to Carry Out the Rail Transportation Policy

Granting DMVW an exemption to discontinue service over the Lines will promote the goals articulated in the national Rail Transportation Policy, 49 U.S.C. § 10101. Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. An exemption would minimize the unnecessary expenses associated with the preparation and filing of a formal discontinuance of service application, expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. §§ 10101 (2) and (7). By granting DMVW a discontinuance now that DMVW and CP have agreed to terminate the Lease and have CP provide common carrier service over the Lines, an exemption will foster sound economic conditions and encourage efficient management. 49 U.S.C. §§ 10101 (3), (5) and (9). Other aspects of the rail transportation policy are not adversely affected.

B. This Transaction Is Of Limited Scope

This transaction is of limited scope. The Lines involved are only approximately 27 total miles long, and are only in one county of one State. By its nature, the impact of the DMVW discontinuance is of limited scope, since the Lines will continue to be operated by CP and no shipper will lose rail service as a result of this transaction. The length of the Lines, their limited geographic area (one county in one State), and the limited impact of the DMVW discontinuance on the Lines (given CP's continued operation) all demonstrate the limited scope of DMVW's discontinuance.

C. This Transaction Will Not Result In An Abuse Of Market Power

With transportation alternatives available, DMVW's discontinuance of service over the Lines under the Lease will not result in an abuse of market power. In addition, CP will continue to operate the Lines.

IV. ENVIRONMENTAL AND HISTORICAL REPORTING REQUIREMENTS

Because DMVW is seeking a discontinuance of service and CP will continue to operate the Lines, environmental reporting requirements under 49 CFR 1105.6(c) do not apply. Also, in accordance with 49 CFR 1105.8(b), no historic documentation is required because CP will continue to operate the Lines. Discontinuance will not result in physical changes to the Lines. Further Board approval would be required for CP to abandon service on the Lines. *Mfrs. Ry.—Discontinuance Exemption—In St. Louis County, MO*, STB Docket No. AB-1075X (STB served July 12, 2011); *Missouri & Valley Park Railroad—Discontinuance of Service Exemption—In St. Louis County, MO*. STB Docket No. AB-105 7X. (STB served June 15, 2010); and *Central Illinois Railroad—Discontinuance of Service Exemption—In Cook County, IL.*, STB Docket No. AB-1066 (Sub-No. 2X) (STB served November 16, 2010) (environmental and historic reporting not required where owner of line is required to continue providing common carrier service on the line).

V. FEDERAL REGISTER NOTICE

A draft Federal Register notice is attached hereto as Exhibit B.

VI. LABOR PROTECTION

The interests of railroad employees of DMVW who may be adversely affected by the discontinuance of service will be adequately protected by the labor protective conditions in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

VII. CONCLUSION

Application of the regulatory requirements and procedures of 49 U.S.C. § 10903 is not required to carry out the rail transportation policy set forth in 49 U.S.C. § 10101, as previously shown. Nor is Board regulation required to protect customers from the abuse of market power. Moreover, this discontinuance of service is of limited scope. Accordingly, DMVW respectfully requests the Board grant this petition for exemption.

Respectfully submitted,

By: 

K&L Gates LLP

Edward J. Fishman
1601 K Street, NW
Washington, DC 20006-1600
(202) 778-9000

**ATTORNEYS FOR DAKOTA,
MISSOURI VALLEY & WESTERN
RAILROAD, INC.**

Dated: August 29, 2014

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2014, a copy of the foregoing document was served by first class mail, postage prepaid, upon the agencies specified in 49 C.F.R. § 1152.50(d)(1) as follows:

North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

Transportation Engineering Agency
Surface Deployment and Distribution Command
United States Department of Defense
1 Soldier Way, Bldg 1900
Scott AFB, IL 62225

Chief, Conservation and Outdoor Recreation Division
Rivers, Trails and Conservation Program
National Park Service
U.S. Department of the Interior
1849 C Street, N.W. (Org. Code 2220)
Washington, D.C. 20240

Thomas L. Tidwell
Chief, United States Forest Service
United States Department of Agriculture
1400 Independence Ave., SW
Washington, DC 20250



Edward J. Fishman

Dated: August 29, 2014

EXHIBIT A

EXHIBIT B

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-933 SUB-NO. 1X

DAKOTA, MISSOURI VALLEY AND WESTERN RAILROAD, INC.
DISCONTINUANCE EXEMPTION
IN BURKE COUNTY, NORTH DAKOTA

Notice of Petition for Exemption to Discontinue Service

On August 29, 2014, Dakota, Missouri Valley and Western Railroad, Inc. filed with the Surface Transportation Board, D.C. 20423, a petition for exemption for discontinuance of service over the approximately 17-mile rail line between milepost 541.0 at Flaxton, ND and milepost 549.64 at Rival, ND; milepost 549.64 at Rival, ND and milepost 550.8 at Lignite Junction, ND; and milepost 550.8 at Lignite Junction, ND and milepost 558.0 near Stampede, ND (the “Flaxton-Stampede Line”), and over the approximately 9.96-mile rail line between milepost 550.8 (previously BNSF milepost 56.96) at Lignite Junction, ND east to the end of Soo Line Railroad Company d/b/a Canadian Pacific Railway Company’s (“CP”) ownership, previously BNSF milepost 47 (the “Lignite Line”).⁴ The Flaxton-Stampede Line and Lignite Line (collectively, the “Lines”) traverse through United States Postal Service ZIP Codes 58737, 58722, 58752, 58727, and 58721, in Burke County, ND. There are no stations on the Lines.

The Lines do not contain federally granted rights-of-way. Any documentation in DMVW’s possession will be made available promptly to those requesting it.

⁴ Because this petition relates to a discontinuance of service rather than an abandonment, the Board typically does not consider Offers of Financial Assistance under 49 U.S.C. §10904 for acquisition of the Lines, trail use requests under 16 U.S.C. §1247(d), or requests under 49 U.S.C. §10905 to negotiate for public use of the Lines. *See Progressive Rail Inc.—Discontinuance of Service Exemption—In Barron County, WI*, STB Docket No. AB-1101X (STB served July 25, 2012); *Mfrs. Ry.—Discontinuance Exemption—In St. Louis County, MO*. STB Docket No. AB-1075X (STB served July 12, 2011); and *Northern Lines Railway, LLC—Discontinuance of Service Exemption- In Stearns County, MN*, STB Docket No. AB-1011 (Sub-No. IX) (STB served May 20, 2011).

This proceeding is exempt from environmental reporting requirements under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

The interests of railroad employees of DMVW will be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by _____.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by the filing fee, which is currently set at \$1,600. See 49 CFR 1002.2(f)(25).

All filing in response to this notice must refer to STB Docket No. AB-933 (Sub-No. 1X) and must be sent to (1) Surface Transportation Board, 395 E. Street, SW, Washington, D.C. 20423-0001; and (2) Edward J. Fishman, K&L Gates LLP, 1601 K Street, NW, Washington, D.C. 20006-1600.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Congressional and Public Service at (202) 245-0230 or refer to the full abandonment and discontinuance regulations at 49 CFR Part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis at (202) 245-0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

Board decisions and notices are available on our website at "www.stb.dot.gov."

Decided: _____, 2014.

By the Board.

EXHIBIT C

NOTICE

Dakota, Missouri Valley and Western Railroad, Inc. ("DMVV") gives notice that on or about August 25, 2014, it intends to file with the Surface Transportation Board, Washington, D.C. 20423, (the "Board"), a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903, et seq. permitting the discontinuance of rail service by DMVV on the approximately 17-mile rail line between milepost 541.0 at Flexton, ND and milepost 549.64 at Rival, ND; milepost 549.64 at Rival, ND and milepost 550.8 at Lignite Junction, ND; and milepost 550.8 at Lignite Junction, ND and milepost 558.0 near Stampede, ND (the "Flexton-Stampede Line") and on the approximately 9.66-mile rail line between milepost 550.8 (previously BNSF milepost 56.98) at Lignite Junction, ND east to the end of Soo Line Railroad Company d/b/a Canadian Pacific Railway Company's ("CP") ownership, previously BNSF milepost 47 (the "Lignite Line"). The Flexton-Stampede and Lignite Lines traverse through United States Postal Service ZIP Codes 58737, 58722, 58752, 58727, and 58721, in Burke County, ND.

The proceeding has been docketed at Docket No. AB 933 (Sub-No. X). DMVV had been operating over the Flexton-Stampede Line since 1990, and the Lignite Line since 2007, pursuant to leases and trackage rights from CP. CP has terminated DMVV's lease rights and will provide rail service over the Flexton-Stampede and Lignite Lines.

This discontinuance of service is exempt from environmental reporting requirements under 49 CFR 1105.8(c); and from historic reporting requirements under 49 CFR 1105.8(b).

Appropriate offers of financial assistance to continue rail service can be filed with the Board. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Board. An original and 10 copies of any pleading that raises matters other than environmental issues (such as trails use, public use, and offers of financial assistance) must be filed directly with the Board's Section of Administration, Office of Proceedings, 395 E Street, S.W., Washington, D.C. 20423-0001 (See 49 CFR 1104.1(a) and 1104.3(a)), and one copy must be served on applicants' representative (See 49 CFR 1104.12(a)). Questions regarding offers of financial assistance, public use or trails use may be directed to the Board's Office of Public Assistance, Governmental Affairs, and Compliance at 202-245-0238. Copies of any comments or requests for conditions should be served on the applicant's representative, Edward J. Flehman, K&L Gates LLP, 1601 K Street N.W., Washington, D.C. 20008, (August 18, 2014).

PUBLICATION FEES

No. Lines 94

Times ONE \$ 88.36

94 ST LINES x .94 = \$88.36

AFFIDAVIT OF PUBLICATION STATE OF NORTH DAKOTA

SS.

County of Ward

AMANDA STARBUCK-MATTSON of said

County and State, being first duly sworn, on oath says: That the MINOT DAILY NEWS is a daily newspaper of general circulation, printed and published in the City of Minot, in said County and State. That the MINOT DAILY NEWS now is and during all times in the foregoing affidavit mentioned has been a newspaper qualified to do legal printing, in accordance with the Statutes of the State of North Dakota, and that I am clerk of the MINOT DAILY NEWS and during all such time covering the publication of this notice have occupied such position on said newspaper, and have personal knowledge of all the facts stated in this affidavit; and that the advertisement headed

AUGUST 21, 2014 D.M.V.W. NOTICE OF INTENTION TO FILE A PETITION

a printed copy of which is hereunto attached was printed and published in said newspaper

ONE times to-wit:

AUGUST 18, 2014

Amanda E. Starbuck-Mattson Clerk.

Subscribed and sworn to before me this

19th Day of August 2014

Shannon Grater

Notary Public, Ward Co, N.D.

C41538

SHANNON GRATER Notary Public State of North Dakota My Commission Expires December 8, 2015