SERVICE DATE – OCTOBER 18, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35644

BNSF RAILWAY COMPANY—
ACQUISITION AND OPERATION EXEMPTION—
NEBRASKA NORTHEASTERN RAILWAY COMPANY

Digest:[1] This decision allows BNSF Railway Company to acquire and operate the 120.4-mile rail line between Ferry Station and O'Neill, Neb., owned by Nebraska Northeastern Railway Company, subject to standard employee protective conditions.

Decided: October 9, 2012

By petition filed on July 20, 2012, BNSF Railway Company (BNSF) seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. §§ 11323-25 to acquire and operate a 120.4-mile rail line owned by Nebraska Northeastern Railway Company (NENE). The rail line (the Line) extends between milepost 4.0, near Ferry Station, Neb., and milepost 124.4, at O'Neill, Neb. We will grant the petition for exemption, subject to standard employee protective conditions.

BACKGROUND

BNSF is a Class I rail carrier that owns and operates lines of railroad in 28 states. NENE is a Class III rail carrier whose only operations are over the Line. Prior to 1996, one of BNSF's predecessors, the Burlington Northern Railway Company (BN), was the owner of, and exclusive operator over, the Line. In 1996, NENE acquired the Line from BN and became the sole operator over it.[2]

BNSF states that it entered into a Purchase and Sale Agreement with NENE dated July 19, 2012, in which BNSF has agreed to reacquire the Line from NENE and recommence common carrier operations over it. BNSF states that its purchase of the Line would strengthen its Agricultural Products franchise in the region. According to BNSF, about 99% of NENE's rail

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[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] See Neb. Ne. Ry.—Acquis. & Operation Exemption—Burlington N. R.R., FD 32999 (STB served July 29, 1996).

traffic consists of grain or grain products. BNSF states that two shippers transport goods on the Line under BNSF's grain shuttle train program, which allows the shippers to transport dedicated 110-car unit grain trains that cycle between the shippers' facilities and the BNSF grain shuttle destination network. According to BNSF, NENE also serves three major ethanol production facilities.

BNSF asserts that integrating NENE's operation into the BNSF network would produce a seamless operation for shippers, allowing them to take full advantage of BNSF's exclusive destination network for grain and grain products. BNSF also claims that it would be able to improve service to shippers by removing the Sioux City area interchange with NENE, thereby eliminating interchange costs and any associated delays. In its petition, BNSF notes plans to selectively raise train speeds on the Line by replacing older rail, currently limited to 10 miles per hour, with rail that would allow operations at 25 miles per hour. BNSF asserts that increased train speeds, along with BNSF's plan to originate and terminate all operations on the Line out of BNSF's Sioux City yard, would allow traffic on the Line to make faster and more efficient connections to BNSF's trains at Sioux City. BNSF further states that the change in ownership of the Line would not adversely affect traffic volumes or routings available to shippers. BNSF asserts that all routings and services currently available to NENE shippers would also be available under BNSF's ownership. Further, BNSF states that grain shuttle trains would continue to operate as they do under NENE, with additional opportunity available for grain shuttle elevator development.

According to BNSF, no anticompetitive effects would result from the proposed transaction. BNSF states that no customer directly served today by NENE is also directly served by BNSF. As such, BNSF asserts that there would be no loss of rail competition. Based upon the foregoing, BNSF states that the proposed transaction would create greater efficiency in BNSF's operations, and improve reliability and service for customers on the Line. No shippers or other parties have filed any objections or opposition to the proposed transaction.

DISCUSSION AND CONCLUSIONS

Pursuant to 49 U.S.C. § 11323(a)(2), prior Board approval is required for a rail carrier to acquire and operate the property of another rail carrier. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation if 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 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. §§ 11323-25 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 of 49 U.S.C. § 10101. BNSF is reacquiring a line it previously owned and operated and has demonstrated that there will be no anticompetitive effects as a result of the proposed transaction. Specifically, there will be no loss of rail competition and no reduction in routings or services for the shippers on the Line. Further, an exemption from the application process will expedite regulatory action and reduce regulatory barriers to entry and exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). An exemption will also foster sound economic conditions and encourage efficient management by allowing all operations on the Line to originate or terminate out of BNSF's Sioux City yard, thereby allowing the Line's traffic to make faster and more efficient connections to BNSF's trains in Sioux City. Also, interchange costs and delays would be eliminated with the removal of BNSF's interchange with NENE at Sioux City. See 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy will not be adversely affected by use of the exemption process.

Regulation of the proposed transaction is not needed to protect shippers from the abuse of market power.[3] The proposed transaction represents a change in ownership and operation of the Line from NENE to BNSF. However, because no shipper directly served by NENE today is also directly served by BNSF, no shipper will experience a reduction in the number of carriers serving it. Moreover, BNSF anticipates no material change in the level or nature of service provided to those shippers. In fact, service may be improved with BNSF's assumption of responsibility for directly serving all the shippers now served by NENE, because BNSF's interchange with NENE at Sioux City, along with its associated costs and delays, would be eliminated. Further, all routings and services currently available to NENE shippers would continue to be available under BNSF's ownership. Nevertheless, to ensure that the shippers are informed of this action, the Board will require BNSF to serve a copy of this decision on all shippers on the Line so that it is received within five days of the service date of this decision, and to certify contemporaneously to the Board that it has done so.

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of employees. Accordingly, as a condition to granting this exemption, the Board will impose the standard employee protective conditions established in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation, Inc., 6 I.C.C.2d 799, 814-26 (1990).

This transaction is exempt from the environmental reporting requirements under 49 C.F.R. § 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 C.F.R. § 1105.8(b)(1) because there are no plans to alter railroad properties 50 years old or older, and BNSF's acquisition of the Line is for continued rail operations; thus, further Board approval would be required to abandon or discontinue service over the Line.

[3] Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

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. § 11323-25, subject to the employee protective conditions in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation, Inc., 6 I.C.C.2d 799, 814-26 (1990).

2. BNSF is directed to serve a copy of this decision on all shippers on the Line so that it is received within five days of the service date of this decision, and to certify contemporaneously to the Board that it has done so.

3. Notice will be published in the Federal Register on October 18, 2012.

4. The exemption will become effective on November 17, 2012.

5. Petitions to stay must be filed by November 2, 2012. Petitions to reopen must be filed by November 13, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.