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SERVICE DATE – JANUARY 14, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35751

IOWA INTERSTATE RAILROAD, LTD.—ACQUISITION EXEMPTION—LINE OF
BNSF RAILWAY COMPANY

Docket No. FD 35755¹

BNSF RAILWAY COMPANY, CBEC RAILWAY INC., IOWA INTERSTATE RAILROAD,
LTD., AND UNION PACIFIC RAILROAD COMPANY—JOINT RELOCATION PROJECT
EXEMPTION—IN COUNCIL BLUFFS, IOWA

Digest:² The Board is granting an exemption for the Iowa Interstate Railroad, Ltd. to acquire approximately 0.75 miles of railroad in Council Bluffs, Iowa, owned by BNSF Railway Company, subject to employee protective conditions. The Board is also approving a related transaction involving relocation of rail lines.

Decided: January 14, 2014

The two proceedings at issue arise out of a major highway project, known as the Council Bluffs Interstate System (CBIS) Improvements Project, which involves the reconstruction of Interstates 29 and 80 in and around Council Bluffs, Iowa. The CBIS project, undertaken by the Iowa Department of Transportation (IDOT), requires the relocation of railroad lines owned by BNSF Railway Company (BNSF), CBEC Railway Inc. (CBEC), Iowa Interstate Railroad, Ltd. (IAIS), and Union Pacific Railroad Company (UP).³

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² 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).

³ BNSF is a Class I rail carrier that owns and operates approximately 32,500 miles of rail line in 28 western and central states and two Canadian provinces. CBEC is a Class III rail carrier that owns six miles of track in the Council Bluffs area, which are used primarily by BNSF and UP to haul coal to a utility plant located south of Council Bluffs. IAIS is a Class II rail carrier that owns or operates approximately 560 miles of rail line in Iowa and Illinois. UP is a Class I

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On August 7, 2013, in FD 35751, IAIS filed a petition for an individual exemption pursuant to 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10902 to acquire approximately 0.75 miles of rail line, known as the Bartlett Line, owned by BNSF. The Bartlett Line extends from milepost 491.00 near 29th Avenue in Council Bluffs, Iowa, to the crossing of the rail line of CBEC at approximately milepost 491.75 in Council Bluffs. By decision served on November 8, 2013, the Board instituted a proceeding under 49 U.S.C. § 10502.

On September 30, 2013, in FD 35755, BNSF, CBEC, IAIS, and UP jointly filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(5) to participate in a joint relocation project in and around Council Bluffs in support of the CBIS project. Notice of the exemption containing a description of the transactions was served and published in the Federal Register, 78 Fed. Reg. 65,040-41, on October 30, 2013. In response to a request by Kansas City Southern Railway Inc. (KCS) for a housekeeping stay, discussed more fully below, the Chairman stayed the effectiveness of the notice of exemption on November 8, 2013, to provide sufficient time for replies to be filed and for the Board to fully consider the arguments presented.

We will grant IAIS's petition for exemption in FD 35751, subject to employee protective conditions. We will allow the notice of exemption in FD 35755 to become effective by lifting the housekeeping stay.

BACKGROUND

The Bartlett Line at issue in FD 35751 is part of BNSF's Council Bluffs Subdivision, which extends from Pacific Junction, Iowa, into the Council Bluffs/Omaha, Neb. area. There are two active shippers on the Bartlett Line, Bartlett Grain Company, L.P. (Bartlett Grain) and Western Engineering Company (Western). Bartlett Grain is the more active shipper of the two, generating a significant volume of outbound grain traffic. Bartlett Grain obtains rail service from KCS over the Bartlett Line pursuant to haulage arrangements with BNSF via the carriers' interchange in Kansas City, Mo. Bartlett Grain states that it has a confidential rail transportation agreement with KCS. The CBIS project requires the relocation of BNSF's Council Bluffs Subdivision several miles east, which means that BNSF could no longer directly serve Bartlett Grain and Western.

Under the proposed transaction, IAIS would acquire the trackage and permanent real estate easement of the Bartlett Line pursuant to a freight easement sale agreement dated May 10,

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rail carrier operating approximately 31,900 miles of rail line in 23 states in the western two-thirds of the United States.

2013. IAIS indicates that it would assume operation and maintenance of the Bartlett Line sometime in 2015, upon completion of the IDOT project and connecting track reconfiguration between the Bartlett Line and the CBEC line at milepost 491.75, which is included in the notice of exemption in FD 35755. IAIS would receive cars from Bartlett Grain and move them over track owned by IAIS and CBEC to interchanges with BNSF or other carriers.

IAIS's petition requested expedited consideration so that the Board's approval would become effective by November 30, 2013. IAIS argued that expedited consideration was necessary for the CBIS project to remain on schedule.

On August 27, 2013, Bartlett Grain and KCS filed replies to the petition. Bartlett Grain states that it currently receives KCS unit train service at its Council Bluffs South Facility (CB South) and that BNSF delivers empty unit trains to CB South and then picks them up either from the northern or southern ends of CB South's siding facility. Bartlett Grain states that it is not clear from IAIS's petition whether CB South will have access to a rail line from the south after the completion of the proposed transactions. Bartlett Grain advises that the parties have not completed negotiations on several key issues and contends that its service would be fundamentally changed by the numerous transactions needed to accommodate the CBIS project. Therefore, Bartlett Grain argues that IAIS should supplement its petition with information regarding new construction of track and whether the proposed transactions would disrupt service to it and other shippers. KCS similarly expresses concern about the impact of the proposed transaction on its service to Bartlett Grain and whether IAIS would seek to escalate switch charges. KCS likewise requests that the Board require IAIS to supplement its petition to include information on the joint relocation project and clarify how it will handle Bartlett Grain's service movements via KCS post-transaction.

On October 17, 2013, IAIS filed a supplement to its petition in response to Bartlett Grain and KCS. IAIS states that, after it acquires the Bartlett Line and replaces the service currently provided by BNSF, Bartlett Grain's industry track will be directly connected to the national rail network by a common carrier railroad line. IAIS states that it will serve the Bartlett Grain facility from the north, which is also a current practice by BNSF.⁴ Regarding switching rates, IAIS states that it is not privy to the private transportation contracts between Bartlett Grain, KCS, and BNSF, but that it intends to utilize switching rates that are comparable to the current switching rate allocation under the relevant contracts. IAIS states that industries on the Bartlett Line are currently closed to reciprocal switching by BNSF, but that IAIS will keep open the line to both BNSF and KCS haulage traffic handled through BNSF when the acquisition occurs. IAIS also claims that Bartlett Grain would be in a better competitive position than it is today, because it would gain access to points on IAIS's lines and to IAIS interchange partners.

⁴ IAIS includes detailed engineering maps showing the proposed trackage. See IAIS Supplement, Ex. 4.

Also, on October 17, 2013, IDOT filed a letter in support of the petition and request for expedited consideration. IDOT states that Board approval is necessary for the CBIS project to proceed as planned.

On November 6, 2013, KCS filed a reply to IAIS's supplement to its petition and a request for a housekeeping stay in the FD 35755 joint relocation exemption proceeding. On the same day, Bartlett Grain also filed a reply to IAIS's supplement and in support of KCS's request for a housekeeping stay. KCS argues that the transaction could cause competitive harm to the service that KCS and BNSF provide to Bartlett Grain.

On November 8, 2013, as noted, the Board instituted a proceeding under 49 U.S.C. § 10502. On the same day the Chairman issued a housekeeping stay in FD 35755, postponing the effective date of the exemption, to provide sufficient time for replies to be filed and for the Board to fully consider the arguments presented.

On November 15, 2013, IAIS filed a reply to the replies of KCS and Bartlett Grain, arguing that there is no basis for the conditions proposed by KCS. On the same day, the joint relocation applicants filed a reply requesting that the Board lift the housekeeping stay in FD 35755.

DISCUSSION AND CONCLUSIONS

Petition for Exemption. Under 49 U.S.C. § 10902, the acquisition of a rail line by a Class II carrier requires prior approval by the Board. Under 49 U.S.C. § 10502(a), 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.

Exempting this line sale 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. IAIS has demonstrated that Bartlett Grain and Western – the shippers on the Bartlett Line – would continue to receive rail service and remain connected to the national rail network by a common carrier railroad line. The proposed transaction is intended to accommodate the CBIS improvement project that addresses regional traffic problems. Thus, granting the exemption would allow a public works project to move forward, fostering sound economic conditions in transportation (49 U.S.C. § 10101(5)). By providing access to points on IAIS's lines and to IAIS interchange partners, the proposed transaction should increase shippers' transportation options, thereby enhancing the long-term viability of operations on the Bartlett Line, promoting efficiency and coordination among railroads (49 U.S.C. § 10101(9)). Granting an exemption from the application process would

minimize the need for Federal regulatory control (49 U.S.C. § 10101(2)) and reduce regulatory barriers to entry into and exit from the rail industry (49 U.S.C. § 10101(7)). Other aspects of the rail transportation policy would not be adversely affected. Therefore, detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy.

Despite arguments by KCS and Bartlett Grain that we must condition our approval of the exemption, we find that regulation of this transaction is not needed to protect shippers from the abuse of market power.⁵ The proposed transaction involves the substitution of IAIS for BNSF as the switching carrier for Bartlett Grain's CB South facility as part of the important CBIS project. Neither Bartlett Grain nor any other shipper would lose access to rail service nor would it experience a reduction in the number of carriers serving it. Because IAIS connects to BNSF and other carriers, shippers on the Bartlett Line would retain all existing routing options and may obtain access to new ones. See Ft. Worth & W. R.R.—Lease Exemp.—St. Louis S.W. Ry., FD 32955 (STB served (Sept. 5, 1996)).⁶ To ensure that the shippers are informed of our action, we will require IAIS to serve a copy of this decision on all shippers on the Bartlett Line by January 21, 2014, and to certify to the Board that it has done so.

KCS argues that the Board must condition the exemption to preclude IAIS from imposing switching charges that discriminate against the BNSF-KCS routing currently used by Bartlett Grain in favor of other connecting carriers so as to economically eliminate Bartlett Grain's access to KCS. But KCS has failed to demonstrate any reason why IAIS would prefer other connecting carriers in Council Bluffs to BNSF. IAIS does not serve Bartlett Grain's other facilities, and should have no reason to disadvantage Bartlett Grain's CB South facility.

Bartlett Grain and KCS also argue that the Board should not grant the exemption unless IAIS provides a commitment regarding the structure and level of its switching charges after the transaction is consummated.⁷ The commitments sought from IAIS apparently relate to contract terms currently existing among Bartlett Grain, KCS, and BNSF. Under the circumstances of this case – where there has been no showing that IAIS would have greater market power than the

⁵ Because we find that regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power, we need not determine whether the proposed transaction is limited in scope under § 10502(a).

⁶ KCS's reliance on Keokuk Junction Railway Company d/b/a/ Peoria and Western Railway—Lease and Operation Exemption—BNSF Railway Company, FD 34974 (STB served Dec. 6, 2007), is misplaced. The Board in that case denied a petition for a lease exemption because the lease would have reduced the number of carriers serving the shipper from two to one. By contrast, substituting IAIS for BNSF does not reduce the shipper's competitive service options.

⁷ KCS Stay Pet. at 6-8 and Ex. A (Bartlett Grain's Nov. 6, 2013 letter at 2).

current carrier, BNSF, that it is replacing – the Board will not require IAIS to provide commitments with respect to its switching service. See Rio Grande Indus.–Purchase & Trackage Rights–CMW Ry. Co., 5 I.C.C.2d 951, 972 n.19 (1989) (rate condition inappropriate where substitution of carriers did not create new market power).

Bartlett Grain has also raised concerns over its physical access to a common carrier line of railroad. In response, IAIS states that it will serve the Bartlett Grain facility from the north, which is also a current practice by BNSF. Bartlett Grain has not indicated that this practice would be inadequate, and IAIS has demonstrated that the proposed transaction would allow Bartlett Grain to continue to receive rail service and remain connected to the national rail network.

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 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 § 10902(d), subject to the standards and procedures established in Wisconsin Central Ltd.—Acquisition Exemption—Lines of Union Pacific Railroad Co., 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 C.F.R. § 1121.4(h), IAIS certified to the Board on August 20, 2013, that it has posted a notice of the transaction at the workplace of employees on the Bartlett Line and served the notice on the national offices of the labor unions representing those employees.

This transaction is exempt from 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 further Board approval would be required to abandon or discontinue service over the Bartlett Line.

As noted above, IAIS requests expedited consideration of its petition so that various agreements relating to the CBIS project may be completed. Accordingly, the exemption will be effective on February 5, 2014, rather than the normal 30 days provided for by 49 C.F.R. § 1121.4(e).

Housekeeping Stay. In this decision, we will lift the housekeeping stay in FD 35755. For the reasons discussed above, KCS has not demonstrated that any conditions regarding switching charges are warranted for the Board to grant the petition for exemption. Further, IAIS has demonstrated that, after the transactions in FD 35751 and FD 35755 take effect, Bartlett Grain's CB South facility would continue to be connected to the national rail network by a

common carrier railroad line.⁸ The Board has addressed KCS's arguments on the merits in this decision. Therefore, a housekeeping stay is no longer needed. The notice of exemption in FD 35755 will become effective on the service date of this decision.

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

It is ordered:

1. In Docket No. FD 35751:

- a. 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.
- b. IAIS is directed to serve a copy of this decision on all shippers on the Bartlett Line so that it is received by January 21, 2014, and to certify contemporaneously to the Board that it has done so.
- c. Notice will be published in the Federal Register.
- d. The exemption will become effective on February 5, 2014.
- e. Petitions to stay must be filed by January 27, 2014. Petitions for reconsideration must be filed by January 31, 2014.

2. In Docket No. FD 35755:

- a. The housekeeping stay entered on November 8, 2013, is lifted.
- b. IAIS, BNSF, CBEC, and UP's notice of exemption is effective on the service date of this decision.

⁸ The Board's decision in Union Pacific Railroad Company—Abandonment Exemption—in Pottawattamie County, IA, AB 33 (Sub-No. 274X) (STB served Dec. 12, 2008), cited by KCS is not on point. The Board denied abandonment in that case because the substitute service would have been over private track and an active shipper would have lost its direct connection to the interstate rail network.

3. This decision is effective on its date of service.

By the Board, Chairman Elliott and Vice Chairman Begeman.