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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35352

PETITION  
OF  
NEBKOTA RAILWAY, INC., AND WEST PLAINS COMPANY  
FOR  
DECLARATORY ORDER

Decided: April 28, 2010

The Board is denying the petition of the Nebkota Railway, Inc. (Nebkota) and its owner West Plains Company (WPC) (jointly, petitioners), for an order declaring certain limits on the use of the Board's class exemption for the acquisition and operation of rail lines by noncarriers codified at 49 C.F.R. § 1150.31.

Nebkota is a Class III railroad that owns approximately 4 miles of rail line at and east of Chadron, Neb. At Chadron, its line physically connects with the Dakota, Minnesota & Eastern Railroad Corporation (DM&E). Nebkota also has trackage rights allowing it to operate over a 28.1-mile line of DM&E track that runs northwest for 7.22 miles from Chadron to Dakota Junction, Neb., and then from Dakota Junction southwest for 20.88 miles to Crawford, Neb., where the DM&E connects with the BNSF Railway Company (BNSF).

Until recently, Nebkota's trackage rights over DM&E have not allowed Nebkota to interchange traffic with DM&E at Dakota Junction for movement north over DM&E. Nebkota has been interchanging traffic with DM&E at that location pursuant to a haulage agreement with DM&E dated October 14, 2008. Under the haulage agreement, Nebkota hauls loaded or empty cars for DM&E's account between Chadron and Dakota Junction for a fixed per-car rate. The haulage agreement gives Nebkota the ability to haul WPC's traffic from Chadron for interchange with DM&E at Dakota Junction. The haulage agreement may be canceled by either party upon 30 days written notice.

By verified notice of exemption filed on January 25, 2010, and docketed as STB Finance Docket No. 35346, Nebraska Northwestern Railroad, Inc. – Acquisition and Operation Exemption – Dakota, Minnesota & Eastern Railroad Corporation, the Nebraska Northwestern Railroad, Inc. (NNW), a noncarrier, invoked the class exemption at 49 C.F.R. § 1150.31 to authorize its acquisition from DM&E (by purchase and lease) of the aforementioned 28.1-mile line of DM&E track between Chadron and Crawford over which Nebkota currently operates via

trackage rights and for a portion via haulage rights. NNW proposed to purchase the 7.22-mile segment of this line between Chadron and Dakota Junction (over which Nebkota transports WPC's traffic via the haulage agreement) and to lease the 20.88-mile segment between Dakota Junction and Crawford. The notice was served on February 10, 2010, and was published on the same date in the Federal Register at 75 Fed. Reg. 6,790.

By petition filed on February 5, 2010, and supplemented on February 17, 2010, petitioners asked the Board to reject NNW's notice of exemption or to stay its effectiveness. As relevant here, petitioners argued that the transaction would result in NNW's cancellation of the above-described haulage agreement and imposition of a substantially higher charge for hauling cars between Chadron and Dakota Junction and that the loss of Nebkota's direct connection to DM&E at Chadron and attendant higher charge would greatly burden WPC and jeopardize Nebkota's ability to survive. To ameliorate the alleged adverse competitive effects of the proposed transaction, petitioners asked the Board to condition any approval of the transaction on NNW's providing Nebkota with haulage rights or trackage rights between Chadron and Dakota Junction under terms substantially similar to those in the existing haulage agreement.

On February 12, 2010, petitioners filed a related petition for declaratory order docketed as STB Finance Docket No. 35352, which is the subject of this decision. To allow Nebkota to continue to meet its obligations to provide rail service over the lines being acquired by NNW and to continue to provide essential rail services to WPC, petitioners asked the Board to clarify that the class exemption at 49 C.F.R. § 1150.31 is limited to those circumstances where the new entrant carrier will: (1) actually perform rail service; (2) not unreasonably interfere with the operations of an incumbent short line already providing service; (3) not seek to exact a payment from the incumbent short line to permit it to provide service; and (4) not interfere with the economic welfare of the only substantive shipper using the line.

On February 19, 2010, NNW and DM&E filed replies opposing Nebkota's petition for rejection or stay and Nebkota's related petition for a declaratory order. As relevant here, they pointed out that (1) Nebkota's trackage rights would continue, (2) DM&E and NNW have agreed to relocate Nebkota's point of interchange with DM&E under the trackage rights from Chadron to Dakota Junction,<sup>1</sup> and (3) DM&E has not assigned the haulage rights agreement to NNW.<sup>2</sup> In opposition to Nebkota's petition for a declaratory order, NNW and DM&E argued that the petition is based on the faulty premises that NNW would be able to block Nebkota's interchange of traffic with DM&E and that NNW would be a "paper railroad" that would not serve shippers. DM&E added that petitioners are not seeking a proper declaratory order to terminate controversy or remove uncertainty but are improperly seeking to reopen the class exemption and amend it without complying with the proper notice and comment procedure for doing so.

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<sup>1</sup> According to DM&E, on the morning of February 18, 2010, it provided Nebkota with an executed amendment effecting this change in the trackage rights agreement.

<sup>2</sup> DM&E adds that the haulage agreement would not apply by its own terms if WPC were to relocate the elevator further east onto Nebkota's tracks.

By letter dated February 22, 2010, petitioners sought leave to withdraw their petition to reject or stay in light of the amended trackage rights agreement between DM&E and Nebkota providing for interchange with DM&E at Dakota Junction. By decision served on February 23, 2010, the Board granted petitioners' request to withdraw their petition in STB Finance Docket No. 35346.

However, in a letter filed on March 17, 2010, petitioners assert that they continue to pursue the declaratory relief sought in STB Finance Docket No. 35352 and ask the Board to issue a procedural schedule for the proceeding. DM&E replied in opposition on March 31, 2010, stressing that there is now no controversy or uncertainty for the Board to address regarding Nebkota's right to continue interchanging traffic with DM&E. According to DM&E, the underlying exemption has become effective, and NNW and DM&E have consummated the transaction authorized by the exemption. DM&E reasserts that the factual predicates of the declaratory order petition are wrong, because the record shows that the transaction would not preclude Nebkota from interchanging traffic with DM&E and that NNW would become a bona fide railroad.

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board has discretion to issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See InterCity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority – Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Based on this standard, the Board will not exercise its discretion to commence a declaratory order proceeding. There is no longer any controversy or uncertainty before the Board that would justify declaratory relief. The grounds petitioners cited for declaratory relief while STB Finance Docket No. 35346 was pending before the Board ceased to exist when they withdrew their petition in that proceeding. Given these circumstances, they may not continue to seek case-specific relief under the guise of a request for a declaratory order.

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

It is ordered:

1. The petition for a declaratory order is denied.
2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.