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SERVICE DATE – DECEMBER 29, 2004

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34630 (Sub-No. 1)]

Dakota Southern Railway Company — Trackage Rights Exemption — State of South Dakota and MRC Regional Railroad Authority

The State of South Dakota (the State) and MRC Regional Railroad Authority (MRC) have agreed to grant overhead trackage rights to Dakota Southern Railway Company (DSRC) over a State-owned line of railroad extending between milepost 654 near Mitchell, SD, and milepost 511.90 in Sioux City, IA, including such yard tracks, sidetracks, and connecting tracks (existing or to be constructed) as are reasonable: (a) to interchange railcars with The Burlington Northern and Santa Fe Railway Company (BNSF) and Dakota, Minnesota & Eastern Railroad Corporation at Mitchell; (b) to access the State-owned line extending westerly from Napa Junction, SD, to Platte, SD; and (c) to interchange railcars with BNSF, Union Pacific Railroad Company, and Canadian National Railway Company at Sioux City. The State and MRC have also agreed to grant to DSRC limited local trackage rights on the Mitchell-Sioux City Line: (i) to move loaded cars of corn, soybeans, and wheat originating at points on the DSRC-operated line between Mitchell and Kadoka, SD, and terminating at the Mitchell Elevator in Mitchell and the Beardsley Elevator in Beardsley, SD; and (ii) to move empty cars via the reverse route. The total distance of the trackage rights to be granted to DSRC is

approximately 142.1 miles. The DSRC-MRC transaction contemplated by the parties was scheduled to be consummated on or after December 17, 2004.

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 its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

The notice of exemption filed in this docket was filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke does not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34630 (Sub-No. 1), must be filed with the Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on DSRC's President: George Alexander Huff, IV, DAKOTA SOUTHERN RAILWAY COMPANY, 408 East Prospect Street, Chamberlain, SD 57325.

The notice of exemption filed with respect to the DSRC-MRC transaction in this docket is related to a notice of exemption concurrently filed in a related docket: STB Finance Docket No. 34630, MRC Regional Railroad Authority — Trackage Rights Exemption — Lines of the State of South Dakota. The notice of exemption filed in the related docket

contemplates MRC's acquisition from the State of the trackage rights that MRC intends to grant to DSRC.

MRC and DSRC have advised that the Mitchell-Sioux City Line, which is owned by the State, is now operated on behalf of the State by BNSF, pursuant to a 1986 Operating Agreement. MRC and DSRC have also advised: that, under the Operating Agreement, the State has the right to grant trackage rights on the Mitchell-Sioux City Line subject to certain BNSF consent; that, although the State has the right to grant trackage rights to MRC for operations by MRC's third-party operator (DSRC), BNSF has not consented to the grant of those rights; and that the failure to provide this consent is now the subject of litigation between the State and BNSF in The Burlington Northern and Santa Fe Railway Company v. State of South Dakota, Case No. 04-470 (S.D. 6th Circuit). MRC and DSRC have further advised that they recognize that BNSF consent may have to be obtained, either voluntarily or through litigation, before DSRC can commence trackage rights operations on the Mitchell-Sioux City Line. MRC and DSRC have suggested, however, that, inasmuch as the Board's authority respecting the notices filed in this docket and in the related docket is "permissive" in nature, the filing of the notices in the two dockets is appropriate as a "prelude" to obtaining any necessary consent.

By letter filed December 17, 2004, BNSF has advised that it has not given its consent, and does not intend to give its consent, to the third-party trackage rights operation contemplated by MRC and DSRC. BNSF has further advised that, in its view, the filings by MRC and DSRC in this docket and in the related docket are intended to improperly influence

the pending state court litigation. BNSF has asked that the Board stress that issuance by the Board of the notices filed in this docket and in the related docket: does not constitute any finding by the Board concerning either the Board's jurisdiction over these transactions or DSRC's right to operate over the line without BNSF's consent; and does not provide any basis for MRC or DSRC to claim that the Board has permitted DSRC to operate over the line in the absence of a final decision by the courts that DSRC has a legal right to conduct such operations.

In view of the ongoing litigation concerning the right of the State to grant the trackage rights contemplated in this docket and in the related docket, it seems best to note that the Board has made no determination, one way or the other, concerning either the right of the State to grant these trackage rights without BNSF's consent or the right of DSRC to operate over the line without BNSF's consent. The contractual dispute respecting the scope of the rights retained by or granted to the State and/or BNSF under the 1986 Operating Agreement must be resolved in a court of competent jurisdiction.

Board decisions and notices are available on its website at "WWW.STB.DOT.GOV."

Decided: December 21, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary