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SERVICE DATE - JANUARY 19, 2005

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34645]

The Burlington Northern and Santa Fe Railway Company — Acquisition and Operation Exemption — State of South Dakota

The Burlington Northern and Santa Fe Railway Company (BNSF), a Class I rail carrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire and operate approximately 369.7 route miles of railroad lines, referred to as the “Core Lines,” that are owned by the State of South Dakota (the State). These lines, which are described in a July 10, 1986 Operating Agreement between a BNSF predecessor (Burlington Northern Railroad Company) and the State, extend principally: between milepost (MP) 777.0 near Aberdeen, SD, and MP 650.6 near Mitchell, SD; between MP 518.9 near Sioux City, IA, and MP 649.7 near Mitchell, SD; between MP 293.1 near Canton, SD, and MP 650.6 near Mitchell, SD;¹ between MPs 74.1 and 68.8 in Sioux Falls, SD; between MP 68.8 near Sioux Falls, SD, and MP 49.4 near Canton, SD; and between MPs 511.9 and 518.9 in Sioux City, IA.

¹ The distance between MP 293.1 near Canton and MP 650.6 near Mitchell is approximately 81.50 miles. See BNSF’s § 1150.31 notice, Exhibit 2, Appendix 1, page 6. BNSF has not explained the discrepancy with respect to the milepost designations.

The Core Lines were once part of the rail system operated by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (the Milwaukee Road). The Milwaukee Road entered bankruptcy in 1977, and, in 1980, it received, both from the Interstate Commerce Commission (ICC) and from the bankruptcy court, approval to abandon the Core Lines. In 1981, the abandoned Core Lines were acquired by the State, and, since on or about July 6, 1981, BNSF has provided common carrier rail service over the Core Lines pursuant to various agreements (the most recent of which is the 1986 Operating Agreement) with the State, and pursuant to a Modified Certificate of Public Convenience and Necessity (the modified certificate) issued by the ICC. See 49 CFR Part 1150, Subpart C (§ 1150.21 et seq.) (these are the “modified certificate” regulations that apply to operations over abandoned rail lines that have been acquired, through purchase or lease, by a State). BNSF contends that it has, under the terms of the 1986 Operating Agreement, a right to acquire the Core Lines from the State.

Because the Core Lines were abandoned by the Milwaukee Road, BNSF has invoked the notice of exemption procedures at 49 CFR Part 1150, Subpart D (§ 1150.31 et seq.) (these are the regulations that apply to acquisitions and operations under § 10901). See The Burlington Northern and Santa Fe Railway Company — Acquisition and Operation Exemption — Lac Qui Parle Regional Railroad Authority, STB Finance Docket No. 33364 (STB served Apr. 15, 1997); Burlington Northern Railroad Company — Acquisition and Operation Exemption — South Dakota Railroad Authority, Finance Docket No. 32017 (ICC served Apr. 2, 1992).

Under the modified certificate regulations at § 1150.21 et seq., a modified certificate operator may not terminate modified certificate service unless it first provides — to the State, to the Board, and to all persons that have used the line within the preceding six months — 60 days’ notice. See 49 CFR 1150.24. BNSF has not yet provided such notice, but it has stated that, once it has acquired the Core Lines, it will notify the appropriate parties that it will cease to provide service under its § 1150.21 modified certificate but will continue to provide service pursuant to its § 1150.31 exemption notice.

BNSF’s § 1150.31 exemption notice was filed to be effective on December 30, 2004. However, by decision served December 29, 2004, the effective date of the exemption was stayed until 11:59 p.m., January 14, 2005. The question of whether the exemption will be stayed beyond that date will be addressed by the Board in a separate decision.

As noted in the decision served December 29, 2004, in this docket, BNSF’s asserted right to acquire the Core Lines is disputed by the State, and is now the subject of litigation in The Burlington Northern and Santa Fe Railway Company v. State of South Dakota, Civ. No. 04-470 (S.D. 6th Circuit). As is also noted in the prior decision, BNSF has acknowledged that, before it can actually acquire title to the Core Lines, it will need to prevail in acquiring the Core Lines from the State whether through voluntary conveyance by the State or involuntary conveyance as may be ordered by the state court. In view of the ongoing litigation concerning BNSF’s right, under the terms of the 1986

Operating Agreement, to acquire the Core Lines from the State, it is appropriate to note that the Board has made no determination, one way or the other, concerning BNSF's asserted right to acquire the Core Lines from the State. 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.

If the verified 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. 34645, 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 BNSF's representative: Adrian L. Steel, Jr., MAYER, BROWN, ROWE & MAW LLP, 1909 K Street, NW, Washington, DC 20006-1101.

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Decided: January 12, 2005.

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

Vernon A. Williams

Secretary