

40982
EB

SERVICE DATE – AUGUST 6, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE

Docket No. FD 35382

NORTHERN PLAINS RAILROAD, INC.—LEASE EXEMPTION—SOO LINE RAILROAD
COMPANY

Decided: August 3, 2010

BY THE BOARD:

Under 49 C.F.R. § 1011.7(b)(10), the Director of the Office of Proceedings (Director) is delegated the authority to determine whether to issue notices of exemption for lease transactions under 49 U.S.C. § 10902. However, the Board reserves to itself the consideration and disposition of all matters involving issues of general transportation importance. 49 C.F.R. § 1011.2(a)(6). Accordingly, the Board revokes the delegation to the Director with respect to the issuance of this notice of exemption. The Board determines that this notice of lease and operation exemption should be issued, and does so here.

Notice

Northern Plains Railroad, Inc. (NPR), a Class III rail carrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.41 to renew its lease of approximately 290.31 miles of rail line of Soo Line Railroad Company, d/b/a Canadian Pacific Railway (Soo), in Minnesota and North Dakota (referred to as the Wheat Lines). NPR has operated the Wheat Lines pursuant to an existing lease with Soo since 1997.¹ According to NPR, NPR and Soo have entered into a

¹ NPR acquired authority to lease and operate approximately 377.55 miles of Soo rail line. See Northern Plains R.R.—Lease and Operation Exemption—Certain Lines of Soo Line R.R., Docket No. FD 33324 (STB served Jan. 9, 1997). In 2009, NPR was authorized to discontinue service over certain lines covered by that lease: between Bisbee, N.D.; and Kramer, N.D., and between Devils Lake, N.D., and Harlow, N.D. See Northern Plains R.R.—Discontinuance of Serv. Exemption—in Ramsey and Benson Counties, N.D., Docket No. AB 1054X (STB served Dec. 28, 2009) (NPR discontinuance on Devils Lake-Harlow line); and Northern Plains R.R.—Discontinuance of Serv. Exemption—in Bottineau, Rolette, and Towner Counties, N.D., Docket No. AB 1054 (Sub-No. 1X) (STB served Dec. 28, 2009) (NPR discontinuance on Bisbee-Kramer line). NPR states that it will renew its lease with Soo but that the lease will only cover approximately 290.31 miles now because Soo has abandoned the lines (described above) over which service had been discontinued. See Soo Line R.R.—Aban. Exemption—in Ramsey and Benson Counties, N.D., Docket No. AB 57 (Sub-No. 54X)

(continued . . .)

Lease Renewal Agreement and a related Renewed Exchange and Operating Agreement, both dated July 19, 2010 (Agreements), which provide for NPR's continued lease of and provision of rail service on the Wheat Lines.² Pursuant to the Agreements, NPR will renew its lease of the Wheat Lines extending: (a) from milepost 309.69 at Thief River Falls, Minn., to milepost 474.5 at Bisbee; (b) from milepost 390.99 at Fordville, N.D., to milepost 445.50 at Devils Lake; and (c) from milepost 535.00 at Kramer, to milepost 605.99 at Kenmare, N.D. NPR states that, as part of the Agreements, NPR will lease 5 miles of abandoned Soo trackage at Kramer and 4.95 miles of abandoned Soo trackage at Bisbee for rail supply and other purposes.³ The term of the lease renewal is 20 years. As required at 49 C.F.R. § 1150.43(h), NPR has disclosed that the Lease Renewal Agreement contains a provision that would limit NPR's future interchange of traffic with a third-party connecting carrier at any location. NPR notes that (other than with Soo) NPR has interchanges with BNSF Railway Company at Ardoch, N.D., Devils Lake, and Warren, Minn.

NPR states that it expects to remain a Class III rail carrier after consummation of the proposed transaction, and certifies that its projected annual revenues for the Wheat Lines as a result of the proposed transaction will not result in the creation of a Class II or Class I rail carrier. In accordance with the Board's requirements at 49 C.F.R. § 1150.42(e), NPR certified to the Board, on June 18, 2010, that it had posted the 60-day notice of the transaction at the workplaces of current NPR employees on the Wheat Lines on June 8 and 9, 2010, that it had posted the notice at the workplaces of Soo employees whose territory includes the Wheat Lines on June 17, 2010, and that it had served the notice on the national offices of the labor unions for such Soo employees on June 17, 2010. NPR stated that there are no labor unions that represent employees of NPR.

NPR states that it expects to consummate the transaction on September 1, 2010 (which is more than 60 days after NPR's certification to the Board that it had complied with the labor notice requirements at 49 C.F.R. § 1150.42(e)).

(... continued)

(STB served Oct. 22, 2004) (Soo abandonment of Devils Lake-Harlow line) and Soo Line R.R.—Aban. Exemption—in Bottineau, Rolette, and Towner Counties, N.D., Docket No. AB 57 (Sub-No. 56X) (STB served Sept. 5, 2008) (Soo abandonment of Bisbee-Kramer line). NPR also notes a change to the Devils Lake endpoint, from milepost 446.0+/- to milepost 445.50.

² NPR's Agreements were filed under seal pursuant to 49 C.F.R. § 1150.43(h)(1)(ii). NPR states that the Lease Renewal Agreement includes other changes beyond the extension of the lease term. As a result, the class exemption at 49 C.F.R. § 1180.2(d)(4) covering lease renewals where only an extension of time is involved is not available here.

³ NPR states that it does not seek any authority here to operate these previously abandoned segments.

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 will not automatically stay the transaction. Petitions for stay must be filed no later than August 13, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35382, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Thomas J. Litwiler, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606-2832.

Board decisions and notices are available on our website at “WWW.STB.DOT.GOV.”

It is ordered:

1. The delegation of authority of the Office of Proceedings, under 49 C.F.R. § 1011.7(b)(10), to determine whether to issue a notice of exemption in this proceeding is revoked.

2. This decision is effective on the date of service.

Decided: August 3, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham. Vice Chairman Mulvey dissented with a separate expression.

VICE CHAIRMAN MULVEY, dissenting:

I disagree with the Board’s decision today to allow this transaction to be processed under the Board’s class exemption procedures at 49 C.F.R. § 1150.41. I believe that transactions which prohibit the lessee carrier from interchanging with any rail carrier other than the lessor carrier should be subject to close scrutiny by the Board and that such scrutiny cannot take place within the expedited notice of exemption process.

Here, NPR seeks authorization for a lease from Soo of nearly 300 miles of rail line in Minnesota and North Dakota (the “Wheat Line”). NPR has leased this line since 1997 and now seeks a 20-year renewal. According to the notice (and further detailed in materials filed under

seal), the prospective lease includes “a provision that would limit NPR’s future interchange of Wheat Line traffic with a third-party connecting carrier at any location.” Notice of Exemption at 4 (emphasis added).

I have indicated my view that interchange commitments should be subject to a searching review by the Board to determine whether they comport with the statute under which Board authorization is sought. See, e.g., Washington & Idaho Ry. – Lease and Operation Exemption – BNSF Ry., FD 35370 (STB served Apr. 23, 2010) (Mulvey, commenting). When the Board adopted new disclosure rules regarding interchange commitments in 2008, we indicated that interchange commitments that contain a total ban on interchange with other carriers would be closely scrutinized. Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, EP 575, slip op. at 15 (STB served Oct. 30, 2007); Disclosure of Rail Interchange Commitments, EP 575 (Sub-No. 1) (STB served May 29, 2008). To fulfill that commitment in this case, the Board should have required a full application (or individual petition for exemption), so that the Board could analyze the competitive impact of the interchange commitment. In certain cases, the Board has required more extensive procedures in transactions that otherwise qualify for the notice process but are deemed to be controversial or non-routine. See, e.g., Northeast Interchange Ry. – Lease and Operation Exemption – Line in Croton-on-Hudson, NY, FD 34734 (STB served Nov. 18, 2005). Our failure to do so here is disappointing, particularly given the length of the leased line, the length of the renewal period, and the fact that the 1997 Board decision authorizing the original lease did not analyze the interchange commitment. See Northern Plains R.R. – Lease and Operation Exemption – Certain Lines of Soo Line R.R., FD 33324 (STB served Jan. 9, 1997).

It is time for the Board to build upon its interchange commitment disclosure rules by also disallowing utilization of the class notice of exemption procedure for transactions that prohibit interchange with third party carriers.