

SERVICE DATE - JULY 28, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41987

WESTERN FUELS SERVICE CORPORATION

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

STB Finance Docket No. 33321

WESTERN FUELS SERVICE CORPORATION--ACQUISITION AND OPERATION  
EXEMPTION--BURLINGTON NORTHERN RAILROAD COMPANY

Finance Docket No. 27579

BURLINGTON NORTHERN, INC., AND CHICAGO AND NORTH WESTERN  
TRANSPORTATION COMPANY--CONSTRUCTION AND OPERATION--BETWEEN  
GILLETTE AND DOUGLAS, IN CAMPBELL AND CONVERSE COUNTIES, WYOMING

Finance Docket No. 29066

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY--APPROVAL  
OF TERMS OF CONSTRUCTION, OWNERSHIP AND OPERATION OF A  
RAILROAD LINE IN CAMPBELL AND CONVERSE COUNTIES, WYOMING

Decided: July 15, 1997

INTRODUCTION

On December 9, 1996, in STB Docket No. 41987, Western Fuels Service Corporation (Western or complainant), a noncarrier, filed a complaint under 49 U.S.C. 11102 seeking an order that would require The Burlington Northern and Santa Fe Railway Company (BNSF or defendant) to grant Western terminal trackage rights over BNSF's North Gillette Line in the Powder River Basin of Wyoming.<sup>1</sup> Western is a wholly owned subsidiary of Western Fuels Association, Inc. (WFA), a fuel supply cooperative that mines, purchases, and ships for its utility-members in Louisiana, the Rocky Mountain West, and the Midwest approximately 20 million tons of coal a year from mines in the Powder River Basin and in Montana, Colorado, New Mexico, and Illinois. Complainant seeks access to BNSF's track north of West Caballo Junction, WY, over distances ranging from 18 miles to 25 miles, so that it may serve, as a Class III railroad, six coal mines on the North Gillette Line now served only by BNSF,<sup>2</sup> and thereby afford what it describes as a competitive alternative to BNSF service that is available to other Powder River Basin mines located on what is known as the Joint Line, a line operated jointly by BNSF and the Union Pacific Railroad Company (UP) that extends south from West Caballo Junction to Shawnee Junction, WY. If Western obtains

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<sup>1</sup> On December 31, 1996, The Atchison, Topeka and Santa Fe Railway Company merged into the Burlington Northern Railroad Company (BN). For simplicity, we will use the new name and short title BNSF throughout this decision to refer to both BN and the newly merged entity.

<sup>2</sup> The six mines are the Buckskin Mine, owned by Triton Coal Company; the Rawhide Mine, owned by Powder River Coal Company; the Eagle Butte Mine, owned by Cyprus Amax Coal Company; the Dry Fork Mine, owned by Dry Fork Coal Company; the Fort Union Mine, owned by Fort Union, Ltd.; and the Clovis Point Mine, owned by Kerr McGee Coal Corp. Complainant seeks the use of defendant's track between West Caballo Junction and each of these mines, a distance of 25 miles to the Buckskin, Rawhide, and Eagle Butte mines (at milepost 9.5), 23 miles to the Dry Fork Mine (at milepost 7.9), 21 miles to the Fort Union Mine (at milepost 6.0), and 18 miles to the Clovis Point Mine (at milepost 3.0).

an access order from the Board, it would originate coal shipments at the six North Gillette mines and interchange them with BNSF or UP at West Caballo Junction for delivery to utility customers.<sup>3</sup>

Along with its complaint, in STB Finance Docket No. 33321, Western filed a notice of exemption under 49 CFR 1150, Subpart D, to acquire and operate over the above-described line.<sup>4</sup> On February 18, 1997, Western also filed a petition requesting the Board to reopen ICC Finance Docket Nos. 27579 and 29066 and, under 49 U.S.C. 10901(c) and 11324(c), modify the authority that the ICC granted to BNSF and the Chicago and North Western Transportation Company (CNW), UP's predecessor, to jointly build and operate the Joint Line, by imposing a condition that would give Western trackage rights over the North Gillette line.<sup>5</sup>

BNSF has filed a motion to dismiss Western's complaint, a petition to reject complainant's notice of exemption (or alternatively a declaration that it is void *ab initio*), and a reply opposing Western's petition to reopen the *Joint Construction* and *Joint Operation* proceedings.<sup>6</sup> Western has replied to each.<sup>7</sup> While not consolidating the three matters before us, we will combine them for

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<sup>3</sup> On January 13, 1997, Western submitted a proposed 270-day procedural schedule and a petition to waive the 180-day statutory deadline for issuance of a decision in the complaint proceeding. BNSF concurred in the request. By a decision served and notice published (62 FR 6301) on February 11, 1997, we granted the requested relief and extended the decisional deadline 90 days from June 7, 1997, to September 5, 1997.

<sup>4</sup> The notice of exemption was served and published (62 FR 1949) on January 14, 1997. The Brotherhood of Locomotive Engineers (BLE), on February 10, 1997, submitted a letter seeking revocation of the notice of exemption. BLE alleges, without explanation or support, that the transaction described in the notice is designed to circumvent BNSF's collective bargaining agreements with BLE. BLE has not satisfied the requirements under 49 U.S.C. 10502(d) that are necessary to revoke an exemption, and its request must therefore be denied.

<sup>5</sup> See *Burlington Northern Inc.--Construction and Operation*, 348 I.C.C. 388 (1976) (*Joint Construction*); *Chicago & N.W. Transp. Co.--Construction*, 363 I.C.C. 906 (1981) (*Joint Operation*); see also *Chicago and North Western Transportation Company and Western Railroad Properties, Incorporated--Notes and Assumption of Obligations*, Finance Docket No. 29975, *et al.* (ICC served Jan. 15, 1986). In our February 11 decision extending the deadline for a decision on Western's competitive access complaint (note 3), we deferred establishing a procedural schedule for the filing of evidence, pending disposition of BNSF's motion of January 15, 1997, to dismiss the complaint. Nonetheless, on February 18, 1997, Western submitted its case-in-chief in the complaint proceeding, which its petition to reopen the *Joint Construction* and *Joint Operation* cases incorporates by reference.

<sup>6</sup> Accompanying BNSF's reply opposing Western's petition to reopen is a petition to waive our requirement at 49 CFR 1115.3(d) limiting replies to 20 pages. Defendant's reply is 42 pages, with a 1-page exhibit attached; an addendum, consisting of numerous exhibits, contains more than 150 pages. We will grant the waiver, because it does not unreasonably burden either Western or us, and attaching the decisions that the railroad cites is a convenience. We advise BNSF that, under sections 1115.3(d) and 1115.4, when a petition to reopen an administratively final action or a reply to such a petition exceeds 10 pages in length, it must be accompanied by a separate preface and summary of argument, not exceeding 3 pages.

UP also filed a reply in opposition to Western's petition to reopen. UP is not a party to this proceeding, but, on our own motion, we will grant it leave to intervene.

<sup>7</sup> On February 28, 1997, BNSF filed a motion to strike Western's February 18 submission of its case in chief in the complaint proceeding, which consisted of verified statements of: (a) a specialist in coal transportation market and pricing issues, (b) Western's Chief Executive Officer and General Manager, and (c) the Manager of Operations and Engineering for Western's parent corporation. Defendant moved to strike the verified statements as an impermissible evidentiary submission contrary to the Board's February 11 decision deferring the filing of evidence (note 5), or as an

(continued...)

handling here. As set forth below, we deny BNSF's motion to dismiss Western's complaint and its petition to reject Western's notice of exemption, but deny Western's petition to reopen the construction and operation proceedings.

## BACKGROUND

In the early 1970s, BNSF and CNW sought to extend their existing rail lines to serve new coal mines opening in the Powder River Basin. In 1972, the ICC granted BNSF authority to construct a 16.6-mile line extending south from its east-west main line through northern Wyoming near Gillette so that it could serve Amax Coal Company's Belle Ayr mine. To serve several other mines, BNSF and CNW shortly thereafter jointly sought authority to construct and operate the Joint Line, originally a 103.5-mile line extending north to Coal Creek Junction, WY, from their respective east-west main lines through southern Wyoming near Shawnee Junction. In the same application, BNSF separately sought authority to construct a 9-mile line, running north from the Coal Creek Junction terminus of the Joint Line, that would connect at the Belle Ayr mine with its recently built 16.6-mile line described above.<sup>8</sup> In *Joint Construction*, the ICC granted each request.

Subsequently, in *Joint Operation*, the ICC approved the agreement between BNSF and CNW to operate the Joint Line. In that proceeding, WFA, Western's parent, asked the ICC to condition its approval of the joint operating agreement by requiring BNSF to grant CNW trackage rights over BNSF's 9-mile line north of Coal Creek Junction, and thereby provide two-carrier rail service to three mines on that segment that would now be available to mines on the Joint Line. The ICC determined that it lacked authority to impose such a condition, particularly over track "unrelated" to that embraced by the joint-operation agreement. 363 I.C.C. at 921-23.<sup>9</sup> The D.C. Circuit affirmed that determination, finding that, in agreeing to jointly build and operate the Joint Line, BNSF and CNW had "no affirmative duty, under either the antitrust laws or the Interstate Commerce Act," to ensure competitive rail service for Powder River Basin mines not on that line. *Mobil Oil Corp. v. ICC*, 685 F.2d 624, 632 (D.C. Cir. 1982).<sup>10</sup>

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<sup>7</sup>(...continued)

impermissible supplement to Western's reply to BNSF's motion to dismiss. Alternatively, BNSF requests leave to respond to Western's submission and has tendered its proposed reply.

On March 7, 1997, Western filed a reply to the motion to strike, arguing that the February 11 decision did not prohibit it from filing verified statements before the procedural schedule was established in the complaint proceeding, and stating that it decided to file the statements so that they could also be used to support its petition to reopen. Alternatively, Western states that it would not object to the Board's receiving BNSF's proposed reply to its February 18 submission, as long as complainant may reply in turn. To fully consider these matters, we will deny BNSF's motion to strike and admit both tendered responses into the record.

<sup>8</sup> For a map of the relevant Powder River Basin rail lines, *see* Exhibit 1 to BNSF's reply to Western's petition to reopen, filed March 10, 1997.

<sup>9</sup> In so ruling, the ICC affirmed the decision of the Administrative Law Judge, who held, *inter alia*, that WFA's proposed trackage rights remedy would impermissibly deprive BNSF of the full benefit and reward of having undertaken to build the 16.6-mile line south of Gillette. *Chicago & N.W. Transp. Co.--Constr. & Oper.--Niobrara & Goshen Counties, Wy., & Sioux & Scotts Bluff Counties, Ne.*, Finance Docket No. 28934, slip op. at 25 (ICC served Oct. 7, 1980) (*CNW Construction and Operation*); *see also Joint Operation*, 363 I.C.C. at 922.

<sup>10</sup> Mobil Oil, joined by WFA, had also asked the ICC to reopen *Joint Construction* and similarly afford CNW trackage rights over BNSF's 9-mile segment north of Coal Creek Junction, so that there would be competitive rail service at Mobil's Caballo Rojo mine located on that segment. The ICC denied Mobil's petition and a subsequent petition for reconsideration, determining that "the new construction proceedings are not the proper proceedings to determine if C&NW or some other rail carrier should be required to provide a competitive service over that line." *CNW Construction and Operation*, slip op. at 3.

In early 1986, the ICC approved CNW's application to build a 10.7-mile line north from Coal Creek Junction that would run parallel to BNSF's 9-mile line and enable CNW to serve three mines then served only by BNSF.<sup>11</sup> Instead of building the line, however, CNW entered into an agreement with BNSF for joint use of BNSF's 9-mile line, thereby extending the Joint Line to West Caballo Junction.<sup>12</sup>

Ten years later, Western, through its complaint, notice of exemption, and petition to reopen, now seeks access over additional BNSF track that would essentially extend the Joint Line north beyond West Caballo Junction. The track at issue embraces most of BNSF's 16.6-mile line, referred to earlier, that was built prior to the construction of the Joint Line, some of BNSF's northern Wyoming main line near Gillette, and the track serving the mines at issue. See BNSF Reply, Exhibit 1. Western alleges that its requested relief is warranted because BNSF's refusal to grant petitioner access to the track improperly preserves the carrier's monopoly over an essential rail facility, and permits it to price rail service for North Gillette Line coal in a way that improperly thwarts the North Gillette mines' ability to compete with Joint Line coal and, consequently, increasingly disfavors coal production at those locations. Western also alleges that this result conflicts with the public's interest of fully exploiting low-sulfur coal deposits, such as those on the North Gillette Line, to improve air quality and more readily reach compliance with Phase II of Clean Air Act Amendments of 1990.

#### MOTION TO DISMISS

BNSF has moved to dismiss Western's complaint on two grounds. First, it argues that what Western seeks access to are not "terminal facilities." Second, BNSF asserts that complainant has failed to allege anticompetitive conduct by the carrier that would support an order compelling Western's access to those facilities.

BNSF's Arguments. BNSF asserts that, under the tests developed for determining whether particular facilities are "terminals," the Board first examines the use of the facilities and the functions performed there, see *Golden Cat Division of Ralston Purina Company v. St. Louis S.W. Ry.*, No. 41550, slip op. at 7, and cases cited therein (STB served Apr. 25, 1996) (*Golden Cat*). Second, it states, the Board assesses the nature of the facilities and the character of the area in which they are located, in particular "(1) whether operations take place within railroad yard limits; and (2) whether service is performed within a cohesive commercial area." *Golden Cat at 7*, citing *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171, 179 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) (*Midtec*). BNSF states that, in applying these standards, the ICC and the Board have determined that a single facility originating or terminating traffic along a rural stretch of track cannot be considered a "terminal facility" for purposes of obtaining an order compelling physical access to another carrier's lines. *E.g., Golden Cat at 7-8.*

BNSF argues that the North Gillette Line mines fit those characteristics and are therefore not terminal facilities. According to defendant, each of the mines is a discrete originator of traffic, and each is located in a remote rural area on a spur line off of its mainline tracks. BNSF further submits that the mines cannot be considered "terminal facilities" because of the character of the unit-coal train operations that take place there. Defendant points out that the essence of unit-train transportation, like that provided to the North Gillette mines, is the use of dedicated unit trains of approximately 105 to 115 cars (generally shipper-owned) continuously cycling between a mine and a coal receiver's coal-burning plants. Such operations, BNSF submits, are efficient precisely because they are unimpeded by the switching, classification, and interchange functions that are characteristic of typical terminal operations.

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<sup>11</sup> *Chicago & N.W. Transp. Co. & Western R.R. Properties, Inc.--Constr. & Oper.--In Campbell County, Wy.*, Finance Docket No. 30700 (ICC served Jan. 15, 1986).

<sup>12</sup> The carriers' joint use agreement was exempted from ICC approval in *Chicago & N.W. Transp. Co., Western R.R. Properties, Inc. & Burlington N. R.R.--Exemption From 49 U.S.C. 11343*, Finance Docket No. 30834 (ICC served Aug. 5, 1986).

Turning to its second ground for dismissal, BNSF argues that terminal trackage rights can be prescribed only to offset actual or threatened competitive abuses. Defendant submits that, under the Board's competitive access rules, 49 CFR 1144.5(a), Western must therefore demonstrate that BNSF has engaged in, or is likely to engage in, anticompetitive conduct.<sup>13</sup> According to defendant, Western's complaint fails to allege conduct of the kind that would warrant terminal access under our rules. Defendant contends that Western's sole allegation of anticompetitive conduct is that BNSF refused, upon request, to voluntarily give complainant access to its track. Complaint ¶ 9. Defendant states that governing case law applying the competitive access regulations makes it clear, however, that merely refusing to provide a potential competitor access to its tracks is not, by itself, conduct that is sufficient to justify a competitive access remedy. *See, e.g., Vista*, 5 I.C.C.2d at 340; *Midtec*, 3 I.C.C.2d at 174, 182; 857 F.2d at 1514. Present law, BNSF asserts, simply does not automatically entitle shippers served by one railroad to additional rail carrier service.<sup>14</sup>

BNSF further argues that Western's rate-related allegations that the mines' captivity to BNSF places them at a "competitive [rate] disadvantage" to Powder River Basin mines served by two rail carriers (Complaint ¶ 10), and that the presence of a second carrier will "lower rail rates" (Complaint ¶ 11), are, even if true, likewise insufficient to warrant a terminal trackage rights remedy. Citing *Midtec*, 857 F.2d at 1508, and *Bottleneck I at 7 n.15, and 8*, defendant argues that the law is likewise clear that, to obtain terminal access, Western must show that BNSF has engaged in anticompetitive conduct, not simply that it has charged unreasonable rates (in which case a separate remedy is already available). In any event, defendant asserts, complainant does not accuse it of charging unreasonable rates for transportation from the involved six mines and, in fact, could not do so, as those rates are subject to contracts that are beyond the Board's jurisdiction.

Western's Arguments. In reply, Western states that the ICC and the Board have found that the definition of "terminal facilities" should be construed liberally.<sup>15</sup> Complainant notes that, in construing the term, the ICC previously relied upon former 49 U.S.C. 10523 (now 49 U.S.C. 13503), which defined terminal areas where "transfer, collection, or delivery" operations takes place. In complainant's view, the mines are properly considered as terminal areas because freight is "transferred" and "collected" there.

Western also argues that the mines and associated mainline track to which it seeks access do not fit into the single-shipper/remote rural-location scenario asserted by defendant, but are instead part of a "cohesive commercial area" that can properly be considered a terminal area. Western points out that the Powder River Basin is one of the nation's premier coal producing regions, with 16 operating coal mines shipping more than 200 million tons of coal by rail in 1995 alone. Complainant states that 40 trains a day are dispatched into and out of the Powder River Basin to carry this coal, and it contends that the dispatch of trains into and out of the area is a single, closely

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<sup>13</sup> *See e.g., Vista Chemical Co. v. Atchison, T. & S.F. Ry. Co.*, 5 I.C.C.2d 331, 335 (1989) (*Vista*); and *Shenango Inc. v. Pitts., Chartiers & Yough. Ry. Co.*, 5 I.C.C.2d 995, 1000-1002 (1989) (*Shenango*).

<sup>14</sup> BNSF analogizes Western's allegations of anticompetitive conduct to those we recently found insufficient in *Central Power & Light Company v. Southern Pacific Transportation Company*, No. 41242, *et al.* (STB served Dec. 31, 1996) (*Bottleneck I*) (STB served Apr. 30, 1997) (*Bottleneck II*), *pet. for review filed No. 97-1081, MidAmerican Energy Co., et al. v. STB & USA* (8<sup>th</sup> Cir. filed Jan. 9, 1997). It points out that, at *Bottleneck I at 7-8*, we found that a mere refusal to open an additional through route was not, by itself, evidence of anticompetitive conduct, stating that, "It has long been held that the statute and the competitive access rules neither direct nor were meant to require the government to create additional, competitive rail through routes simply upon demand."

<sup>15</sup> *See Midtec*, 3 I.C.C.2d at 179, and *Denver and Rio Grande Western Railroad Company and Missouri-Kansas-Texas Railroad Company v. St. Louis Southwestern Railway Company*, Finance Docket No. 30759 (ICC served Jan. 9, 1987), at 5, both citing *CSX Corp.--Control--Chessie and Seaboard C.L.I.*, 363 I.C.C. 518, 585 (1980).

coordinated and cohesive system. Western states that BNSF has a staff of about 400 people in the Gillette area and maintains major train yards in Gillette and Guernsey, WY, to serve and fuel locomotives, switch cars, store spare cars, change crews, and assemble unit trains. Complainant emphasizes that there are yards, switching facilities, and freight assembly facilities contained within the Powder River Basin.

In response to BNSF's second ground for dismissal, Western asserts that its complaint for terminal trackage rights is not based on its allegation that BNSF's rates on the North Gillette Line are unreasonably high, or solely on defendant's refusal of complainant's request for access. Rather, it avers that it is alleging specific pricing acts by BNSF that are having anticompetitive effect on the North Gillette Line mines, and also specific acts of monopolization by BNSF directed against a potential rail competitor, allegations that Western believes, if established on the record, would warrant the Board's prescription of terminal trackage rights.

As to the former, Western asserts that it is complaining that BNSF's pricing practices in the Powder River Basin have created an ever-increasing competitive imbalance in the market for coal between North Gillette Line mines and Joint Line mines, stemming largely from the disparity in rail rates that BNSF makes available to captive shippers on the North Gillette Line and those available to mines with competitive rail service on the Joint Line. In addition, Western complains that BNSF refuses to price its services based on the heat content of the coal. Complainant states that the mine owners routinely price their coal based on its heat content, charging utilities lower per ton prices for low Btu coal, found more generally on the North Gillette Line, than for high Btu coal, found more generally on the Joint Line. BNSF, Western submits, refuses to engage in such "value pricing" for low Btu coal, insisting instead on pricing its rail service for low Btu coal and high Btu coal on an equivalent cents-per-ton basis. This, complainant avers, causes buyers to prefer high Btu coal on the Joint Line rather than the low Btu coal available on the North Gillette Line.

Conversely, Western asserts that it is also complaining that BNSF engages in value pricing in a manner detrimental to complainant with respect to the transportation of "beneficiated" coal, coal that has greatly increased heat content as a result of going through a moisture extracting process, and, as a result, greater value to many utilities. Complainant asserts that BNSF will transport beneficiated coal only if a shipper pays a substantial premium--one that is allegedly greater than the small increased cost of transporting that coal. This assertedly results in situations where the beneficiation process, if it is to occur at all, takes place on the Joint Line, where shippers have access to competitive rail service. Western points out that one of the North Gillette Line mine owners, Triton Coal Company, has changed its plans to beneficiate coal at its North Gillette mine and will do it instead at its mine on the Joint Line, producing what complainant asserts is the irrational result of mine owners beneficiating higher Btu coal rather than lower Btu coal.

Thus, Western asserts that it is complaining that BNSF's pricing practices are highly anticompetitive and work in a way that improperly disfavors the production and sale of North Gillette Line coal. Western points out that, in the face of greatly increased demand for Powder River Basin coal, North Gillette Line coal production is rising only slowly and is based on load growth at plants of utilities that signed contracts for coal years ago. As a result of BNSF pricing practices, new sales, complainant avers, are going almost exclusively to the Joint Line mines, with the result that the North Gillette Line mines are progressively losing market share.

As to BNSF's actions toward it in its role as a potential rail competitor, Western asserts that its complaint does not allege that it is entitled to terminal trackage rights merely because defendant refused its request to enter the North Gillette Line as a second rail carrier. Instead, citing *Vista*, 5 I.C.C.2d at 335, complainant states that it has alleged that relief is warranted because it is not feasible for it to construct another rail line to serve the mines on the North Gillette line, and that, in those circumstances, BNSF's refusal to grant Western access to this "essential facility" is a "classical" act of monopolization that the Board, and the ICC before it, have determined must be established to obtain forced terminal trackage rights under the competitive access regulations. Complaint ¶ 9.

Lastly, Western asserts that dismissal is not warranted because the Board may alternatively grant its request for terminal trackage rights under the public interest standard of section 11102(a),

without regard to the competitive access regulations. The overall public interest, complainant avers, supports an access order. As indicated earlier, complainant asserts that development of the Powder River Basin is one of the keys to the nation's meeting its clean air objectives. It also asserts that the nation is moving to a system of deregulation and competition in the provision of electricity to consumers. Western claims that there is a public interest in national energy independence that favors Board action to remove the transportation disincentive under which the North Gillette Line mines operate which, according to Western, discourages coal production in the area. Complainant also asserts that there is a public interest in increased state and Federal royalties and severance taxes that would result from increased production in the Powder River Basin.

Discussion. As we have stated on several occasions, the prescription of terminal trackage rights is an extraordinary remedy, one to be afforded only when less intrusive remedies such as rate relief, alternative through routes, or reciprocal switching are insufficient. *See, e.g., Shenango*, 5 I.C.C.2d at 1002; *Midtec*, 857 F.2d at 1502; *Golden Cat* at 9. Based on its complaint and the verified statements that comprise its purported case-in-chief, we have serious reservations as to whether Western has alleged or established anticompetitive conduct by BNSF that, under our competitive access rules, would warrant such a drastic remedy. To a significant degree, Western's complaint can be read as based essentially only on the right of the captive North Gillette Line mines to rate relief through forced access by a second carrier over the relevant BNSF track, and complainant's claimed right to provide that service upon the BNSF's refusal to allow Western access to those "essential facilities." It is well-settled, however, that neither an incumbent railroad's ability to price its services above a level that might prevail if competitive service were available (including pricing up to a maximum reasonable level), nor its refusal of a request for access to those facilities, is conduct that, standing alone, warrants a competitive access remedy under our regulations. *Midtec*, 3 I.C.C.2d at 174; 857 F.2d at 1504-05, 1507-08, 1514; *Shenango*, 5 I.C.C.2d at 1001.<sup>16</sup>

As recounted above, however, Western, in attempting to establish anticompetitive conduct, has alleged that BNSF has used its market power to engage in specific pricing practices that have improperly thwarted the production and sale of North Gillette Line coal, and that, without competitive rail service, the carrier will continue to do so. While we are not yet convinced that these contentions are anything more than a disguised claim of rate unreasonableness, we must, in considering a motion to dismiss, construe factual allegations in a light most favorable to complainant. *See e.g., Rio Grande Indus.--Trackage Rights--Soo Line R.R.*, Finance Docket No. 31505, 1989 ICC LEXIS 351, at \* 5-6 (ICC served Nov. 13, 1989) (*Rio Grande*). Taking this standard and all other factors into account, we will deny BNSF's motion to dismiss the complaint and, as set forth below, establish a procedural schedule which, after affording a very brief period for Western to supplement its case-in-chief, will permit BNSF to file responsive evidence to these and any other of Western's claims, and allow for complainant to file rebuttal.

While we are permitting its complaint to proceed, however, we reject Western's argument that we may use the "public interest" language of 49 U.S.C. 11102 to prescribe terminal trackage rights without regard to the competitive access regulations. Clearly, the Board may consider broader public interest factors such as those asserted by complainant in weighing whether or not to prescribe terminal trackage rights; as the ICC observed, while a "focus on anticompetitive conduct" is "appropriate" in these matters, it is "not necessarily exclusive." *Midtec*, 3 I.C.C.2d at 178. However, while the competitive access regulations, as promulgated, did not apply to requests for terminal trackage rights under section 11102, the ICC and the Board have consistently determined since that they must be satisfied to obtain this extraordinary remedy. *Id.*; *see also Shenango*, 5 I.C.C.2d at 1000-01; *Golden Cat* at 8.

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<sup>16</sup> Our reservations are also heightened by the posture of this case: Western is a noncarrier that would become a railroad only by obtaining forced access to BNSF's lines, and its requested relief, to a significant extent, is based on allegations of harm to the coal shippers on the North Gillette Line, even though none of the mines has complained about BNSF's rates or service or come forward to support Western's complaint. *Cf. Philadelphia Belt Line R.R. Co. v. Conrail*, Finance Docket No. 32802, 1996 STB LEXIS 336, at \* 16-17 (STB served July 2, 1996)

## PETITION TO REJECT NOTICE OF EXEMPTION

BNSF requests that we reject Western's notice of exemption that accompanied its complaint for the reason that the non-consensual acquisition of trackage rights described in it does not fall within the categories of exempt transactions covered by the regulations at 49 CFR Part 1150, Subpart D. BNSF avers that there is no suggestion in the decision establishing the class exemption,<sup>17</sup> or in any subsequent decisions, that the procedures were intended as a vehicle for obtaining trackage rights in circumstances such as those present here. BNSF argues further that the notice must be rejected for failure to comply with the requirements of section 1150.33(c) that the notice contain a statement that an agreement has been reached or details about when an agreement will be reached. The railroad emphasizes that no agreement exists or is even under consideration here. BNSF contends that, as an alternative to rejection, the Board should declare the notice void *ab initio*, as it falsely implies that a trackage rights agreement has been reached or will be reached in the future.

In reply, Western argues that the plain language of Subpart D and the statutes authorizes its notice. It states that section 1150.31(a) indicates that the exemption applies to transactions resulting in the initiation of operations under 49 U.S.C. 10901, and that section 10901(a)(4) covers Board authorization for a person other than a rail carrier to acquire a railroad line. Western points out further that sections 1150.32, .33, and .34 all specifically describe procedures for transactions that involve the creation of Class III carriers, which it seeks to become. Western believes that its invocation of the exemption authority here is consistent with the policies underlying 49 U.S.C. 10505 (now section 10502) and the *Class Exemption* decision, and it avers that BNSF has not shown otherwise. Finally, Western contends that the procedural course it is following -- filing the notice of exemption under Subpart D while prosecuting its complaint under section 11102 -- is an administratively proper and efficient path.

BNSF's petition to reject Western's notice of exemption will be denied. Although uncommon, the approach Western has taken is neither inconsistent with our regulations nor otherwise impermissible. The notice correctly indicates that no agreement has been reached. The notice states that Western is seeking to obtain access to BNSF's terminal facilities in the pending complaint proceeding. Because Western is not now a carrier, it cannot engage in trackage rights; thus, contrary to BNSF's characterization, the notice of exemption describes an acquisition-of-authority-to-operate transaction, not a trackage rights transaction. As such, it is covered by our rules at 49 CFR 1150.31, *et seq.*

As BNSF recognizes, notices of exemption published under 49 CFR Part 1150, Subpart D are only permissive in nature. Our publication of the notice here neither grants Western the legal right to operate over BNSF's property nor forces the railroad to grant Western access to the line in question. Operations by Western over the subject line cannot commence unless and until its right to use the line is established. *See Wisconsin & Southern Railroad Co.--Lease and Operation Exemption--Soo Line Railroad Company, d/b/a CP Rail System*, Finance Docket No. 32706 (ICC served Aug. 2 and Dec. 22, 1995); *Rio Grande Ind., Inc.--Pur. & Track--Soo Line R. Co.*, 6 I.C.C.2d 854, 876-78 (1990). However, should we grant Western the authority to use the line, the exemption may provide a means by which Western can initiate its operations over the line.

## PETITION TO REOPEN

In addition to seeking trackage rights over BNSF's North Gillette Line through its competitive access complaint, Western alternatively requests, pursuant to 49 U.S.C. 722(c), that we reopen the *Joint Construction* and *Joint Operation* proceedings and, more than 15 years after the cases were decided, condition the authorities granted there to build and operate the Joint Line by affording Western trackage rights over the North Gillette Line. Western contends that "substantially

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<sup>17</sup> *Class Exemption--Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) (*Class Exemption*).

changed circumstances" require this relief.<sup>18</sup> It argues that 15 years of "bifurcated rail" service in the relevant Powder River Basin area has produced disastrously anticompetitive consequences, and it asserts that reopening these cases and affording Western trackage rights over the North Gillette Line would mitigate that situation. In support, Western reiterates the allegations made in its complaint and in its reply to the motion to dismiss, as supplemented by its evidentiary presentation in the complaint proceeding that was submitted along with its petition to reopen.

In reply, BNSF details the background of *Joint Construction* and *Joint Operation* and submits that, on numerous occasions before each of these cases became final, WFA, Western's parent, unsuccessfully sought essentially the same relief, based on the same arguments, that Western seeks here -- trackage rights over BNSF lines north of the Joint Line. BNSF points out that, in *Joint Operation*, the ICC recognized that mines served exclusively by BNSF might be placed at a competitive disadvantage when, in approving BNSF/CNW's joint operating agreement, it refused the last of WFA's repeated requests that it impose a condition granting CNW trackage rights to BN's 9-mile line north of Coal Creek Junction. The ICC rejected the argument that BNSF's "monopoly" position over the line required that CNW be permitted access to it, determining that it was not appropriate for the agency to condition its approval of the joint-operating agreement by extending it to track not included in the carriers' agreement. 363 I.C.C. at 922-23.

As BNSF recounted, eventually it voluntarily entered into a joint-use agreement with CNW for the 9-mile line that extended the Joint Line from Coal Creek Junction to West Caballo Junction. Now, for the same reasons advanced by WFA regarding the 9-mile line, Western seeks trackage rights over BNSF lines north of the new Joint-Line terminus to provide competitive rail service to captive BNSF shippers on those lines. BNSF argues that the fact that there are mines on the North Gillette Line captive to it is not the kind of "changed circumstance" that would warrant reopening; such a result, the carrier argues, was foreseen at the time authority to construct and operate the Joint Line was granted, and requests for relief from that result, on essentially the same grounds asserted by Western here, were rejected. The ICC, BNSF asserts, firmly established in several decisions that it would not impose conditions extending the Joint Line to track beyond what the carriers voluntarily agreed to, determining that BNSF should retain for lines that it solely built the full benefits of its "private initiative." 363 I.C.C. at 922.

BNSF also argues that the Board is without authority to impose trackage rights conditions in the subject finance dockets in any event, asserting that a railroad can be forced to grant trackage rights over its lines only as a condition to a merger with another railroad, or as ancillary relief in connection with an order under 49 U.S.C. 11102 providing forced access to a railroad's terminal facilities. The agency's lack of authority, BNSF submits, is even more pointed here because the North Gillette Line was not the subject of the underlying requests to construct and operate the Joint Line.

UP views the petition to reopen as an attack on the principle that pro-competitive transactions do not become anticompetitive simply because unaffected shippers do not receive the same benefits as affected shippers. UP views Western's "new evidence" simply as an allegation that some shippers did not benefit from a transaction in the way that affected shippers did. The UP opposes the imposition of any conditions here.

The petition to reopen will be denied. We need not address whether the Board may condition a grant of construction and operating authority by imposing trackage rights over the rail line that is the subject of that requested authority, because we clearly lack that power over a line that, like the one here, is beyond it. No part of the North Gillette Line, including BNSF's 16.6-mile spur to the Belle Ayr mine built just prior to the construction of the Joint Line, was the subject of BNSF and CNW's application to build and operate the Joint Line or of BNSF's embraced request to solely construct the 9-mile line north from Coal Creek Junction, then the northern terminus of the Joint Line. We have no general authority to compel an unwilling rail carrier to grant trackage rights to another carrier, e.g., *Magner-O'Hara Scenic Ry. v. ICC*, 692 F.2d 441, 445 (6th Cir. 1982), and

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<sup>18</sup> Under section 722(c), we may reopen a proceeding and change a prior action because of "material error, new evidence, or substantially changed circumstances."

we find no statutory basis that permits us to use our power to authorize new rail construction or new rail operations to effect that result over the BNSF's previously existing North Gillette Line.

This result is consistent with longstanding principles underlying our grants of authority, as well as with principles of administrative finality and commercial certainty. Our grants of authority, whether, for example, for the conveyance of rail property or the construction of new rail line, are permissive. *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 306 (1954). Thus, should a rail carrier find that any conditions that we impose upon granting construction authority are unacceptable to it, it can forgo construction. As we have indicated, in *Joint Construction* and *Joint Operation*, BNSF defeated a request by WFA that the ICC grant a trackage rights condition over its 9-mile line north of the planned northern terminus of the Joint Line at Coal Creek Junction, and it then proceeded with the construction of the Joint Line and its separately owned 9-mile line. Clearly, it would be an extraordinary case in which we would revisit a grant of construction authority 15 to 20 years after these lines have been built and modify it by imposing roughly the same trackage rights condition, this time over an unrelated BNSF track farther north. No justification for such extraordinary relief has been shown here.

Thus, we agree with BNSF and UP that Western has not shown new evidence or changed circumstances of the type contemplated by the statute and our regulations for reopening. The petition's grounds are, in essence, an allegation that Powder River Basin mines that have had rail service available from two carriers have fared better than those that have had service available from only one carrier. Predictions to that effect were the basis for WFA's requested trackage rights over BNSF's 9-mile line that was denied 15 years ago, and, for all the reasons outlined above, that basis is similarly insufficient today. Any opportunity for Western to obtain trackage rights over the North Gillette Line, therefore, will depend on its competitive access complaint.

#### PROCEDURAL SCHEDULE

Notwithstanding our February 11, 1997 order deferring a procedural schedule for the submission of evidence in the competitive access case (STB Docket No. 41987) until disposition of BNSF's motion to dismiss, Western submitted its evidentiary case-in-chief on February 18. In light of our decision here, however, we will afford complainant a brief period of 15 days to file any supplemental evidence and argument. BNSF will then have 60 days to file its responsive evidence and argument, and complainant 20 days to file rebuttal. As noted earlier, we granted Western's request to extend the decisional deadline in this matter (49 U.S.C. 11102 (d)) until September 5, 1997. On our own motion, we now extend the deadline indefinitely, reflecting the parties' earlier request for an exemption from the statutory deadline for resolution of this proceeding.

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

*It is ordered:*

1. BLE's petition to reject revoke the notice of exemption in STB Finance Docket No. 33321 is denied.
2. The motion to strike complainant's case-in-chief in STB Docket No. 41987 is denied.
3. The motion to dismiss the complaint proceeding in STB Docket No. 41987 is denied.
4. UP is granted leave to intervene in Finance Docket Nos. 27579 and 29066.
5. BNSF's request for waiver of the page limitation provisions of 49 CFR 1115.3(d) in Finance Docket Nos. 27579 and 29066 is granted.
6. The petition to reopen the proceedings in Finance Docket Nos. 27579 and 29066 is denied.

7. In STB Docket No. 41987, complainant may file supplementary evidence no later than 15 days after July 28, 1997.

8. Defendant's responsive evidence is due no later than 60 days after July 28, 1997.

9. Complainant's rebuttal is due no later than 80 days after July 28, 1997.

10. This decision is effective on August 27, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary