

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35068

SOO LINE RAILROAD COMPANY D/B/A CANADIAN PACIFIC RAILWAY–
ACQUISITION AND OPERATION EXEMPTION–BNSF RAILWAY COMPANY

Decided: August 29, 2007

By petition filed on July 16, 2007, Soo Line Railroad Company d/b/a Canadian Pacific Railway (CPR) and BNSF Railway Company (BNSF) (collectively, petitioners) seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 11323-25, for CPR's acquisition and operation of BNSF's property interests in 35.26 miles of rail lines that are jointly owned by CPR and BNSF (the Joint Line) and a contiguous 9.96-mile rail line that is solely owned by BNSF (the BNSF Line) (the Joint Line and the BNSF Line are collectively referred to as the Conveyed Lines).¹ The Board will grant the exemption, subject to labor protective conditions.

BACKGROUND

BNSF is a Class I rail carrier that owns and operates lines of railroad in 28 states. CPR is a Class I rail carrier that operates lines of railroad in eight states on lines owned by CPR or on lines over which CPR has trackage rights.

Prior to 1959, BNSF's predecessor, Great Northern Railway Company (Great Northern), and CPR's predecessor, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company (Soo), had rail lines that ran parallel to each other. The Soo lines extended from Crosby, ND, eastward through Rival, ND, and the Great Northern lines extended from Crosby eastward through Lignite, ND, and between Hankinson, ND, and Geneseo, ND. Pursuant to an agreement, dated September 18, 1959 (1959 Agreement), Soo abandoned its redundant rail line between Rival and Crosby and Great Northern abandoned its redundant rail line between Hankinson and Geneseo. Soo was given a one-half undivided interest in the Joint Line and Great Northern was given a one-half undivided interest in the Hankinson-Geneseo Line, and the savings of these arrangements were divided proportionately by the parties. Each party also was given the right to operate over the Joint Line. Initially, neither party had the right to serve industries that were

¹ Concurrently, petitioners filed a motion for protective order pursuant to 49 CFR 1104.14 to protect the highly confidential and commercially sensitive terms and conditions of a Purchase and Sale Agreement (the Agreement) submitted, under seal, in this proceeding. Petitioners filed both a confidential version and a public version of the Agreement. The Board issued a protective order on July 27, 2007.

exclusively served by the other party, but each had the right to serve new industries. As a result of a condition imposed by the Board's predecessor, the Interstate Commerce Commission (ICC), in Great Northern Pac.–Merger–Great Northern, 331 I.C.C. 228 (1967), Soo gained access to all industries that were situated on or adjacent to the Joint Line. The 1959 Agreement also gave BNSF the obligation to maintain the Joint Line at its sole expense.

In August 1990, the 1959 Agreement was amended to permit Dakota, Missouri Valley and Western Railroad, Inc. (DMVW), to operate over the Joint Line as part of DMVW's lease and operation of other CPR-owned rail lines in the region.² DMVW recently renewed and supplemented its arrangement with CPR.³

There are currently four active rail shippers located on the Conveyed Lines. CHS, Inc. (CHS), operates numerous grain elevators in the western United States. It has an elevator at Lignite, which is exclusively rail served by BNSF, from which CHS ships grain to a number of destinations. For the past several years, CHS has shipped an average of 300 to 400 cars of grain annually from Lignite. Bearpaw Energy operates a natural gas liquids plant at Lignite. Its exclusive marketer, Lodgepole Energy (Lodgepole), ships approximately 8 rail cars of natural gas liquids per week from the Lignite plant to a variety of destinations in the United States and Canada. New Century Ag (New Century) is a co-operative with facilities at Crosby and Noonan, ND, which are jointly served by BNSF and by CPR through DMVW. New Century also has facilities located on the rail line west of Crosby that are served exclusively by DMVW for CPR. All of these facilities are rail served for outbound shipments of grain and an occasional inbound shipment of fertilizer. New Century ships approximately 16 million to 22 million bushels of grain per year with BNSF and CPR (via DMVW) to and from the jointly served facilities at Crosby and Noonan. Superior Grains, Inc. (Superior Grains), operates a facility in Crosby, from where it currently uses the services of BNSF and CPR (via DMVW).

As a result of the proposed transaction, petitioners state that CHS's and Lodgepole's rail transportation options will be enhanced as CHS will gain access to CPR and will retain access to BNSF through CPR (via DMVW), and Lodgepole will gain access to CPR and will retain access to BNSF through CPR (via DMVW). The rail options of New Century and Superior Grains will be unaffected by the proposed transaction. New Century will retain access to CPR by way of DMVW and will retain its present access to BNSF through CPR (via DMVW). Superior Grains will retain access to CPR by way of DMVW and will retain access to BNSF through CPR (via DMVW). In support of its petition, petitioners attached copies of letters supporting the proposed transaction.

² See Dakota, Missouri Valley and Western Railroad, Inc.–Lease and Operation Exemption–Soo Line Railroad Company, Finance Docket No. 31720 (ICC served Sept. 19, 1990).

³ See Dakota, Missouri Valley and Western Railroad, Inc.–Lease and Operation Exemption–Soo Line Railroad Company, STB Finance Docket No. 34904 (STB served July 28, 2006).

In the instant petition, pursuant to the Agreement, dated July 10, 2007, BNSF has agreed to transfer to CPR all of BNSF's property interests⁴ in: (1) a 32.54-mile rail line located between BNSF milepost 89.5, at Crosby, and BNSF milepost 56.96, at Lignite Junction, ND; (i) the 1.16-mile connecting track located between CPR milepost 549.64, at Rival, and CPR milepost 550.8, at Lignite Junction; (ii) the 1.07-mile connecting track located between BNSF milepost 64.5, at Kincaid, ND, and CPR milepost 558.28, at Columbus, ND;⁵ and (iii) the 0.49-mile connecting track at Crosby extending from CPR milepost 582.35 to the original CPR main line extending west to Whitetail, MT, which currently are jointly owned and operated by CPR and BNSF; and (2) a 9.96-mile rail line located between milepost 56.96, at Lignite Junction, and milepost 47.0, near Lignite, which is solely owned and operated by BNSF. According to petitioners, BNSF is retaining, pursuant to section 2.3 of the Agreement, its ability to solicit rail transportation business on the Conveyed Lines. Petitioners state that, once the proposed transaction is approved by the Board, CPR and BNSF will enter into a Haulage Service Agreement (Haulage Agreement),⁶ whereby CPR will agree to haul loaded and empty rail cars tendered by BNSF in the revenue waybill and car hire account of BNSF between Minot, ND, and BNSF customers on the Conveyed Lines (Haulage Operations). CPR also will enter into an agreement with DMVW, whereby DMVW will lease and operate certain rail lines, including the Joint Line and the BNSF Line.

Petitioners indicate that the purpose of the proposed transaction is to foster more efficient and economical operations on the Conveyed Lines and in the region while, at the same time, preserving competitive options for the active customers located on the Joint Line and enhancing competition for two active customers located on the BNSF Line.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11323(a)(2), prior Board approval is required for a rail carrier to acquire and operate the property of another rail carrier. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it is found that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

⁴ According to petitioners, pursuant to section 2.2 of the Agreement, BNSF is retaining certain mineral rights in the properties being conveyed.

⁵ Petitioners state that CPR does not have its own milepost designation at Kincaid and BNSF does not have its own milepost designation at Columbus.

⁶ Petitioners filed a redacted version of the Haulage Agreement as an exhibit to the redacted Agreement. The unredacted version was filed concurrently, under seal, as part of the unredacted Agreement.

Detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. 11323-25 is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Rather, an exemption will promote that policy by minimizing the need for Federal regulatory control over the proposed transaction [49 U.S.C. 10101(2)], promoting a safe and efficient rail transportation system [49 U.S.C. 10101(3)], fostering sound economic conditions in transportation [49 U.S.C. 10101(5)], reducing regulatory barriers to entry into and exit from the rail industry [49 U.S.C. 10101(7)], encouraging efficient management of railroads [49 U.S.C. 10101(9)], and promoting energy conservation [49 U.S.C. 10101(14)]. Other aspects of the rail transportation policy are not adversely affected.

Currently, both BNSF and DMVW operate over and service the customers on the Joint Line, with BNSF responsible for maintaining the Joint Line. BNSF trains operate from Minot by way of Berthold, ND, and Niobe, ND, to service the customers on the Conveyed Lines. CPR has a parallel route between Minot and Lignite Junction. As a result of the proposed transaction, the CPR traffic will continue to move as it does today. The BNSF traffic will be originated or terminated on the Conveyed Lines by DMVW and handled between Lignite Junction and Minot in conjunction with CPR pursuant to the Haulage Agreement. Because the BNSF traffic originating or terminating on the Conveyed Lines can be handled in existing DMVW or CPR trains to and from Minot, the proposed transaction will eliminate the redundant BNSF trains currently moving over the parallel BNSF line, thereby creating a greater efficiency in the operations of BNSF, CPR, and DMVW and improving service for the customers on the Conveyed Lines. In addition, DMVW will assume the maintenance responsibilities for the Conveyed Lines which it can perform more efficiently and economically than BNSF. DMVW already maintains the CPR track west and east of the Joint Line, and handles considerably more traffic (including originating, terminating, and overhead) over the Joint Line than BNSF. The Joint Line has a tendency to flood in the spring, which has forced BNSF to embargo the line until repairs can be made. DMVW has plans to make repairs to the Joint Line, which should enhance service for the existing customers, including those customers west of the Joint Line served exclusively by DMVW for CPR, and should improve CPR's and BNSF's ability to compete for additional traffic currently moving by other modes.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The proposed transaction merely represents a change in the ownership of the rail lines that are being conveyed. There will be no loss of rail competition. CPR will continue to operate as it does today. Through the Haulage Agreement, BNSF retains the right to service all customers on the Conveyed Lines. Thus, BNSF will continue to provide rail service to all shippers on the Conveyed Lines at competitive rates and there will be no material change in the level or nature of service provided to those shippers. All of the customers will be able to ship their products as they have previously and two of the customers will gain additional options. The bridge traffic that currently moves over the Joint Line will continue to move as in the past. Existing customers on the Joint Line will retain the services of both BNSF and CPR, while two customers on the BNSF Line not only will retain BNSF service but will gain access to CPR, and thus will have an enhanced competitive position. As a result, the proposed transaction will

enhance intramodal competition. Nevertheless, to ensure that the shippers are informed of this action, the Board will require petitioners to serve a copy of this decision on CHS, Lodgepole, New Century, and Superior Grains within 5 days of the service date of this decision, and to certify to the Board that they have done so. Given this market power finding, the Board need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of employees. Accordingly, as a condition to granting this exemption, the Board will impose the standard employee protective conditions established in New York Dock Ry.–Control–Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

This transaction is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) because it will not result in a significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 CFR 1105.8(b)(1) because CPR's acquisition of BNSF's interests in the Conveyed Lines is for the purpose of continued rail operations and further Board approval is required to abandon or discontinue service and there are no plans to alter or dispose of properties subject to the Board's jurisdiction that are 50 years old or older.

Petitioners have requested expedited action on this petition for exemption. According to petitioners, in the spring of 2007, BNSF embargoed the Joint Line because of flooding, which the Joint Line experiences on a fairly routine basis. They state that DMVW is planning to make repairs to the Joint Line to improve service but cannot begin the repairs and upgrades until the proposed transaction and its lease transaction with CPR is exempted by the Board.⁷ Petitioners indicate that DMVW would need to begin the repair work by early September 2007, in order to complete the work before winter. The request is reasonable. Accordingly, this decision is being issued on an expedited basis and the exemption is being made effective upon service.

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

⁷ On July 30, 2007, DMVW, a Class III rail carrier, filed a notice of exemption under 49 CFR 1150.41 to lease and operate, pursuant to an agreement with CPR, approximately 45 miles of rail line that CPR plans to acquire from BNSF and then lease to DMVW. See Dakota, Missouri Valley & Western Railroad, Inc.–Lease and Operation Exemption–Soo Line Railway Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 35055 (STB served Aug. 10, 2007).

It is ordered:

1. Under 49 U.S.C. 10502, the above-described transaction is exempted from the prior approval requirements of 49 U.S.C. 11323-25, subject to the employee protective conditions in New York Dock Ry. Control–Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

2. Petitioners shall serve a copy of this decision on CHS, Lodgepole, New Century, and Superior Grains within 5 days of the service date of this decision and certify to the Board that it has done so.

3. This decision will be published in the Federal Register on September 7, 2007.

4. The exemption will become effective on date of service and publication.

5. Petitions to reopen must be filed by September 27, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary