

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35370

WASHINGTON & IDAHO RAILWAY, INC.—LEASE AND OPERATION EXEMPTION—
BNSF RAILWAY COMPANY

Decided: April 22, 2010

On April 8, 2010, Washington & Idaho Railway, Inc. (W&IR), a Class III rail carrier, filed a verified notice of exemption under 49 C.F.R. § 1150.41 to permit W&IR to lease and operate, pursuant to a lease agreement with BNSF Railway Company (BNSF), approximately 1 mile of track, consisting of: (1) BNSF track 2309, being the west leg of the wye beginning at the clearpoint of BNSF track 2305, at Washington Yard, in Marshall, Wash., to and including the turnout to BNSF's line segment 384 at MP 0.43; and (2) BNSF's line segment 384 from MP 0.43 to and including MP 1.00, near Marshall. We will reject this notice as incomplete.

W&IR states that the lease will facilitate interchange and switching between W&IR and BNSF. As required by 49 C.F.R. § 1150.43(h), W&IR has disclosed that the lease agreement contains a provision that limits W&IR's use of the trackage at Marshall to interchange with BNSF. With this disclosure, W&IR is required to submit a *complete* version of the document containing or addressing the interchange commitment. 49 C.F.R. § 1150.43(h)(ii). W&IR concurrently filed with its verified notice of exemption a partial copy of the lease agreement, marked "highly confidential" and submitted under seal pursuant to 49 C.F.R. § 1104.14(a). The filed lease agreement, however, does not include the exhibits to the agreement that are listed in the table of contents, including Exhibit B, which is a copy of the interchange agreement. The notice, therefore, is incomplete. As a result, W&IR's filing fails to satisfy the Board's rules, and the notice of exemption will be rejected without prejudice.

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

It is ordered:

1. The notice of exemption is rejected without prejudice.
2. This decision is effective on the date of service.

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

VICE CHAIRMAN MULVEY, commenting:

I concur with the Board's decision to reject the notice in this case due to W&IR's failure to comply with the Board's rules at 49 C.F.R. § 1150.43. I also want to state my ongoing concern with lease and sale transactions that contain restrictions on interchange.

It has long been my view that interchange commitments – contractual restrictions in rail line lease or sale transactions that preclude or severely limit the buyer or lessee carrier from interchanging with any carrier except the seller or lessor carrier – can be anticompetitive and should be subject to a searching inquiry by the Board. In 2008, the Board adopted new disclosure rules that require parties to transactions with interchange commitments to disclose the nature of the restrictions on interchange. Disclosure of Rail Interchange Commitments, EP 575 (Sub-No. 1) (STB served May 29, 2008). The Board also 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).

The lease transaction in this case includes an interchange commitment that is a total ban on interchange by W&IR with any carrier other than BNSF. No reason is given in the rejected notice as to why this interchange restriction is necessary, particularly given the representation that BNSF is the only carrier other than W&IR that physically serves the interchange point at issue. Thus, the interchange commitment in this case appears to be gratuitous and may be a challenge either to the concerns the Board raised in Review of Rail Access about total bans on interchange or Congressional consideration of interchange commitments in recently proposed legislation.

Although the Board's recent disclosure rules were an important first step toward alleviating the potential harm associated with interchange commitments, I believe the Board should take the next step and disallow utilization of the class notice procedures for transactions that contain a total ban on interchange. The expedited class notice procedures are insufficient to allow for the close scrutiny that total interchange bans warrant. Rather, transactions including such provisions would be more appropriately reviewed by the Board through either a petition for exemption or an application under, in this case, 49 U.S.C. § 10902.