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SERVICE DATE - APRIL 10, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33853

CEMEX USA—PETITION FOR DECLARATORY ORDER—THE  
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: April 5, 2000

On February 29, 2000, Cemex USA (Cemex), a shipper of aggregates, filed and served on The Burlington Northern and Santa Fe Railway Company (BNSF) a petition for a declaratory order. The petition was supported by a verified statement by Mr. Gary P. Burns, Cemex's Director of Supply Chain.<sup>1</sup> Cemex requests that a proceeding be instituted and that the Board find: (1) that the 1.6-mile BNSF line (the Line) that serves Cemex's Fort Worth, TX distribution terminal is a line of railroad and not exempt lead or spur track under 49 U.S.C. 10906 and may not be abandoned without complying with the requirements of 49 U.S.C. 10903 et seq.; (2) that BNSF's threats to abandon the Line without complying with section 10903 constitute an unreasonable practice under 49 U.S.C. 10704; and (3) that a restricted weight embargo BNSF imposed on the Line violated the notice requirement in 49 U.S.C. 11101(c), is intended to pressure Cemex into purchasing the Line, and otherwise constitutes an unreasonable practice under section 10704. In its reply, BNSF contends that the disputed track is exempt spur and requests that such a finding be made if the Board decides to issue a declaratory order.

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. The Board and its predecessor, the Interstate Commerce Commission (ICC), have exercised broad authority in handling such requests. In determining whether to entertain such petitions, the agency considers a number of factors, including the significance to the industry, the ripeness of the controversy, and whether a proceeding is necessary to terminate an active controversy. Cemex's petition satisfies the established

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<sup>1</sup> Cemex designated the declaratory order petition and verified statement as confidential under 49 CFR 1104.14 and moved for a protective order to protect the financial information in them and any confidential, proprietary, or commercially sensitive information that might be submitted in the future. A protective order was issued in a decision served on March 10, 2000, BNSF filed its reply on March 16, 2000, and Cemex filed redacted copies of the declaratory order petition and verified statement on March 27, 2000.

On March 22, 2000, BNSF submitted a letter stating that its reply contains information Cemex considers confidential and proprietary. BNSF requested that the reply be removed from the public record and included under the purview of the protective order. BNSF stated that redacted copies would be filed after the Cemex redacted copies are filed. BNSF's request was granted in a decision served on March 31, 2000.

criteria. See, e.g., Chicago SouthShore & South Bend Railroad—Petition for Declaratory Order—Status of Track at Hammond, IN, STB Finance Docket No. 33522 (STB served Jan. 28, 1998). A proceeding is instituted under the modified procedure rules, 49 CFR 1112, to resolve the instant controversy. The procedural schedule is set forth below.

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

It is ordered:

1. A declaratory order proceeding is instituted under the modified procedure on the basis of written statements submitted by the parties. All parties must comply with the Board's Rules of Practice at 49 CFR subchapter B, including 49 CFR 1112 and 1114.
2. Cemex's opening statement is due by May 10, 2000.
3. BNSF's reply is due by June 9, 2000.
4. Cemex's rebuttal statements by June 29, 2000.
5. This decision is effective on its service date.

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

Vernon A. Williams  
Secretary