

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34645

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
— ACQUISITION AND OPERATION EXEMPTION —
STATE OF SOUTH DAKOTA

Decided: December 29, 2004

This decision grants a housekeeping stay of the effective date of the notice of exemption filed in this proceeding by The Burlington Northern and Santa Fe Railway Company (BNSF).

BACKGROUND

The Core Lines. This proceeding concerns certain railroad lines (referred to as the “Core Lines”) that are owned by the State of South Dakota (the State), and that are the subject of a 1986 Operating Agreement between a BNSF predecessor (Burlington Northern Railroad Company) and the State. The Core Lines were once part of the rail system operated by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (the Milwaukee Road), which entered bankruptcy in 1977, and which, in 1980, received approval to abandon the Core Lines. In 1981, the abandoned Core Lines were acquired by the State. Since then, BNSF has provided common carrier rail service over the Core Lines pursuant to various agreements with the State, and pursuant to a Modified Certificate of Public Convenience and Necessity issued by the Board’s predecessor, the Interstate Commerce Commission (ICC). See 49 CFR Part 1150, Subpart C.

BNSF’s Exemption Notice. On December 23, 2004, BNSF, a Class I rail carrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire and operate the Core Lines. BNSF contends that, pursuant to the terms of its agreements with the State, it has an option to purchase the Core Lines. BNSF notes that, although it is clearly a rail carrier, it used the notice of exemption procedures at 49 CFR Part 1150, Subpart D, which are applicable to 49 U.S.C. 10901 acquisitions by noncarriers. BNSF argues that, because the Core Lines were abandoned by the Milwaukee Road, they are no longer subject to the Board’s jurisdiction, and, therefore, the acquisition and operation of the Core Lines by a rail carrier is subject to the prior approval requirements of 49 U.S.C. 10901 rather than those of 49 U.S.C. 11323 (governing line sales between carriers). Because its operations over the Core Lines will not change as a result of taking legal title, BNSF asserts that no employees will be adversely affected by this transaction.

Contractual Dispute. BNSF has advised that it has a contractual dispute with the State which is now the subject of litigation in The Burlington Northern and Santa Fe Railway Company v. State of South Dakota, Civ. No. 04-470 (S.D. 6th Circuit). BNSF acknowledges that, before it can actually acquire title to the Core Lines, it will need to prevail in acquiring the Core Lines from the State whether through voluntary conveyance by the State or involuntary conveyance as may be ordered by the state court. BNSF seeks the Board's permissive authority to acquire and operate the Core Lines in response to the State's argument, made in the state court proceeding, that, because BNSF has not received Board authority to acquire the Core Lines, BNSF has no right to exercise the purchase option.

Stay Petition. On December 29, 2004, the State filed a petition seeking a stay of the notice of exemption filed in this proceeding by BNSF, pending resolution of the State's forthcoming petition to partially revoke or reject the notice. BNSF replied by letter on December 29, 2004, arguing that any remedial action, should it be necessary, can be taken after the effective date of its notice of exemption.

DISCUSSION AND CONCLUSIONS

A housekeeping stay of the effective date of the notice of exemption is appropriate to allow the Board time to consider the issues presented in the stay petition in a more orderly fashion. The notice of exemption process is typically reserved for noncontroversial matters but, as the filings demonstrate, the issues in this proceeding are in significant dispute. This proceeding will therefore be stayed until 11:59 p.m., January 14, 2005. BNSF, which had only a few hours to respond to the stay petition, may file a further reply by 12:00 noon, January 7, 2005.

It is noted that this order reflects no determination concerning the ongoing litigation in South Dakota state court over BNSF's asserted purchase option. The contractual dispute between BNSF and the State must be resolved in the court of competent jurisdiction, and this order is intended to have no bearing on the resolution of that matter.

It is ordered:

1. The effective date of the notice of exemption filed in this proceeding is stayed until 11:59 p.m., January 14, 2005.
2. BNSF's further reply to the stay petition should be filed no later than 12:00 noon, January 7, 2005.

3. This decision is effective on its service date.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary