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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35601

BNSF RAILWAY COMPANY
– TRACKAGE RIGHTS EXEMPTION –
UNION PACIFIC RAILROAD COMPANY

**PETITION TO REJECT NOTICE OF EXEMPTION AND
REQUEST FOR STAY OF EFFECTIVE DATE OF EXEMPTION**

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Union Pacific Railroad Company (“UP”) hereby petitions the Board to reject the Verified Notice of Exemption filed by BNSF Railway Company (“BNSF”) in this proceeding on February 21, 2012. UP further asks the Board to stay the effective date of the exemption, if a stay is needed to give the Board sufficient time to act on UP’s petition to reject the notice.

BNSF’s notice of exemption is an attempt to obtain Board authority for trackage rights over a UP line known as the Lockport Branch. The Lockport Branch is the subject of an abandonment proceeding that is pending before the Board in *Union Pacific Railroad Company – Abandonment Exemption – In Lafourche Parish, LA*, STB Docket No. AB 33 (Sub-No. 277X). In January 2012, BNSF convinced the Board to stay the abandonment proceeding by claiming that it already had Board authority to operate over the Lockport Branch. Had the Board not stayed that proceeding, UP could have consummated the abandonment by now, and BNSF’s attempt to obtain trackage rights would be moot. BNSF now recognizes that, contrary to its earlier representations, it does not have Board-authorized trackage rights over the Lockport Branch. However, BNSF is attempting to further manipulate the Board’s processes by seeking trackage rights authority through the exemption process, over the objection of UP.

Under the circumstances, BNSF's attempt to obtain Board authority for trackage rights over the Lockport Branch is an inappropriate use of the notice of exemption mechanism. This is not the type of routine and uncontroversial matter contemplated by the trackage rights class exemption procedure.

The Board should reject BNSF's Verified Notice of Exemption before the exemption becomes effective on March 22, 2012. If necessary, the Board should protect the integrity of its processes by staying the effectiveness of the exemption until it can act on UP's petition to reject the notice.

I. BACKGROUND

On September 29, 2011, Louisiana & Delta Railroad, Inc. ("LDRR") and UP filed a Combined Notice of Exemption, through which LDRR sought to discontinue operations over, and UP sought to abandon, the portion of the Lockport Branch extending from milepost 1.7 near Raceland, Louisiana, to milepost 14.2 near Jay, Louisiana (the "Line"). In their notice, LDRR and UP certified that no local or overhead traffic had moved over the Line for at least two years.¹ The exemptions were scheduled to become effective on December 14, 2011.²

On December 6, 2011, BNSF filed a letter claiming that it had "Board-sanctioned authority" to serve all present and future shipper facilities on the Line as a result of the Board's decision in *The Burlington Northern & Santa Fe Railway Company and Union Pacific Railroad Company – Acquisition Exemption – Lines Between Dawes, TX, and Avondale, LA*, FD 33630

¹ UP and LDRR Combined Notice of Exemption at 3, AB 33 (Sub-No. 277X) (filed Sept. 29, 2011).

² *Union Pac. R.R. – Abandonment Exemption – In Lafourche Parish, LA*, AB 33 (Sub-No. 277X), slip op. at 2 (STB served Nov. 14, 2011).

(STB served Sept. 29, 1998) (the “50/50 Line Decision”).³ In a January 6, 2012 letter, BNSF repeated its claim to have “Board authority” to serve customers on the Line and argued that UP could not consummate the abandonment “until such time as BNSF discontinues its operating authority over the line.”⁴

In a decision served January 30, 2012, the Board instituted a housekeeping stay in the abandonment proceeding to resolve the issue raised by BNSF and ordered UP and BNSF to file documents the parties had cited in their prior submissions, along with any additional evidence and argument, by February 9, 2012.⁵

On February 9, 2012, UP filed evidence demonstrating that BNSF had no Board-sanctioned authority to operate over the Line.⁶ As UP’s evidence showed, contrary to BNSF’s claim, the *50/50 Line Decision* did not authorize BNSF’s operations over the Line. Rather, the *50/50 Line Decision* granted a joint BNSF and UP petition for an exemption pursuant to 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. §§ 11323-11325 for the acquisition of joint ownership of a former Southern Pacific line between Dawes, Texas, and Avondale, Louisiana (the “50/50 Line”).

³ Letter from BNSF Ry. at 1, AB 33 (Sub-No. 277X) (filed Dec. 6, 2012).

⁴ Letter from BNSF Ry. at 2, AB 33 (Sub-No. 277X) (filed Jan. 6, 2012).

⁵ *Union Pac. R.R. – Abandonment Exemption – In Lafourche Parish, LA*, AB 33 (Sub-No. 277X), slip op. at 3 (STB served Jan. 30, 2012). LDRR consummated its discontinuance of service over the Line on December 31, 2011. LDRR continues to have common carrier authority to operate between milepost 0.1 and milepost 1.7 of the Lockport Branch. UP could not consummate its abandonment at the same time because the Board had extended the due date for filing offers of financial assistance after a company called Valentine, LLC, submitted a formal expression of an intent to file an offer of financial assistance. *Union Pac. R.R. – Abandonment Exemption – In Lafourche Parish, LA*, AB 33 (Sub-No. 277X), slip op. at 2 (STB served Dec. 13, 2011); *see also* Letter from Valentine, LLC, AB 33 (Sub-No. 277X) (filed Dec. 29, 2011) (notifying the Board that Valentine, LLC subsequently decided not to file an Offer of Financial Assistance).

⁶ UP hereby incorporates by reference the evidence it filed in AB 33 (Sub-No. 277X).

As UP explained, the agreement in which BNSF and UP agreed to acquire joint ownership of the 50/50 Line (the “Term Sheet Agreement”) also gave BNSF the right to serve industries on former Southern Pacific branches connecting to the 50/50 Line, and the Lockport Branch is one such branch.⁷ However, as UP showed, the petition for exemption made clear to the Board that the parties were not seeking Board authorization for BNSF operations associated with the industry access provision.⁸ As UP also showed, when the Board granted the petition for exemption, it authorized only the parties’ exchange of ownership interests in the 50/50 Line; it did not authorize any operations pursuant to the industry access provisions of the Term Sheet Agreement.⁹

In its February 9 submission, BNSF did not provide any evidence to contradict UP’s evidence regarding the meaning of the Term Sheet Agreement, the *50/50 Line Decision*, or a September 1, 2000 Agreement that formalized the Term Sheet Agreement (the “September 1, 2000 Agreement”). Rather, BNSF simply reasserted its claim that its access to customers on the Lockport Branch was discussed in the *50/50 Line Decision*. BNSF did not identify any Board-authorized operating rights that required discontinuance authority from the Board before UP could abandon the Line.

In its Verified Notice of Exemption in this proceeding, BNSF seeks authority for trackage rights over the Lockport Branch between milepost 0.1 and milepost 14.2 – the authority

⁷ UP Evidence and Argument at 4, AB 33 (Sub-No. 277X) (filed Feb. 9, 2012).

⁸ *Id.*

⁹ *Id.*; see also *50/50 Decision* at 3. As UP explained in its February 9 submission, BNSF did not need to obtain operating authority from the Board to provide service to shippers under the industry access provision because it had the right to serve shippers using haulage arrangements, reciprocal switching arrangements, or by interchanging traffic with LDRR. None of these means of serving shippers required Board authorization, and none requires discontinuance prior to UP abandonment of the Line. UP Evidence and Argument at 6, AB 33 (Sub-No. 277X) (filed Feb. 9, 2012).

it claimed to have in its filings in the abandonment proceeding. BNSF says it filed the notice of exemption “out of an abundance of caution” (Verified Notice of Exemption at 5); however, BNSF still has no evidence that the Board had previously authorized BNSF operations over the Lockport Branch.

BNSF attached to its notice an agreement between BNSF and UP dated August 1, 2000 (the “August 1, 2000 Agreement”). The August 1, 2000 Agreement, like the Term Sheet Agreement and the September 1, 2000 Agreement, sets forth BNSF’s right to conduct trackage rights operations on the Lockport Branch and other branches connecting to the 50/50 Line under certain conditions – namely, if BNSF provides appropriate notice to UP and the lines were still being used to serve customers. BNSF does not claim that it previously submitted the August 1, 2000 Agreement to obtain Board authorization for any of the trackage rights addressed in that agreement.

In fact, the August 1, 2000 Agreement shows that BNSF has no present right to trackage rights over the Line. Section 6 of the August 1, 2000 Agreement protects UP against what BNSF is trying to do through this proceeding, which is to require UP to maintain a line that is not being used to serve shippers. Section 6 protects against that possibility by providing that BNSF may use the trackage covered by the agreement “only during the time period that such trackage is to be utilized for access pursuant to the Term Sheet.” August 1, 2000 Agreement, § 6. As UP’s notice in the abandonment proceeding makes clear, UP is not using the Line for access to shippers, and it has not done so for years. However, if BNSF wants to preserve the Line for its own future use, it is free to submit an offer of financial assistance under 49 U.S.C. § 10904.

II. THE BOARD SHOULD REJECT BNSF’S VERIFIED NOTICE OF EXEMPTION BECAUSE THE CLASS EXEMPTION PROCESS IS INAPPROPRIATE FOR THE TRANSACTION CONTEMPLATED BY BNSF.

“[T]he notice of exemption process is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board’s regulations, that ordinarily do not require greater regulatory scrutiny. Thus, notices of exemption are intended to be used for routine and non-controversial cases.” *Winamac S. Ry. – Trackage Rights Exemption – A. & R. Line, Inc.*, FD 35208, slip op. at 2 (STB served Jan. 9, 2009). “[T]he class exemption process is not appropriate for controversial cases in which a more detailed record is required than what is produced through a notice invoking a class exemption.” *James Riffin d/b/a The Northern Cent. R.R. – Acquisition & Operation Exemption – In York County, PA*, FD 34501, slip op. at 6 (STB served Feb. 23, 2005); *see also The Burlington N. & Santa Fe Ry. – Acquisition & Operation Exemption – State of South Dakota*, FD 34645, slip op. at 2-3 (STB served Jan. 14, 2005).

The transaction contemplated by BNSF is not appropriate for consideration under the “class exemption” procedure that BNSF invoked by filing its notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(7). The contemplated transaction is neither routine nor non-controversial. Rather, it is part of an ongoing campaign to interfere with the abandonment of the Line. BNSF has already stalled the abandonment by convincing the Board to stay that proceeding through its claims that it already had the authority it is seeking through this proceeding. If the Board allows BNSF to obtain trackage rights authority through the exemption process before lifting the stay in the abandonment proceeding and allowing UP to consummate the abandonment, the Board will have sanctioned BNSF’s effort to undermine the Board’s processes. Under the circumstances, in addition to rejecting the exemption because the contemplated transaction is not routine and non-controversial, the Board should reject the exemption to protect the integrity of the Board’s processes. *See, e.g., SF&L Ry. – Acquisition & Operation Exemption – Toledo, Peoria &*

Western Ry. Corp. Between La Harpe & Peoria, IL, FD 33995, slip op. at 3 (STB served Jan. 31, 2003) (“[A]ny government agency has inherent authority to act to ensure the fairness, efficiency, and integrity of its processes....”) (internal quotation omitted).

Moreover, Board precedent establishes that the class exemption under 49 C.F.R. § 1180.2(d)(7) is not appropriate for the contemplated transaction because that exemption is the appropriate mechanism only in the circumstance “that the rights are, in fact, volitional on the part of both parties to the transaction – i.e., that the granting carrier does not object.” *Winamac*, slip op. at 2. In *Winamac*, the Board rejected a notice of exemption based on a 14-year-old written agreement. The Board observed that “the underlying justification for the trackage rights class exemption is not just that the agreement has been reduced to writing, but ... that the granting carrier does not object.” *Id.* As the Board explained, “even if the [written agreement] is still operative and binding on [the grantor], the very fact that [the grantor] nevertheless now objects suggests that a notice of exemption still would not be the appropriate mechanism for seeking Board authority for those rights.” *Id.* at 3. Here, UP is objecting to BNSF’s effort to obtain Board authorization to operate over the Lockport Branch. Accordingly, the class exemption process is not appropriate for BNSF’s contemplated transaction.

Finally, the Board should reject the notice of exemption because BNSF is using the class exemption procedure for an improper purpose. BNSF plainly has no present intent to use the rights for which it is seeking an exemption. As shown in the abandonment proceeding, there are no active shippers on the Line. BNSF appears to be trying to force UP to maintain the Line indefinitely for BNSF’s potential use, despite the protections built into the August 1, 2000 Agreement. But whatever BNSF’s broader objectives may be, BNSF is attempting to use the class exemption process to frustrate UP’s legitimate interest in abandoning the Line, and Board

precedent establishes that an exemption will be rejected when a transaction appears designed to further an impermissible purpose. *See, e.g., Union Pac. R.R. – Operation Exemption – In Yolo County, CA*, FD 34252 (STB served Dec. 5, 2002); *Jefferson Terminal R.R. – Acquisition & Operation Exemption – Crown Enters., Inc.*, FD 33950 (STB served Mar. 19, 2001); *Riverview Trenton R.R. – Acquisition & Operation Exemption – Crown Enters., Inc.*, FD 33980 (STB served Feb. 15, 2002).

III. THE BOARD SHOULD STAY THE EFFECTIVE DATE OF BNSF’S VERIFIED NOTICE OF EXEMPTION UNTIL IT CAN ACT ON UP’S PETITION TO REJECT THE NOTICE.

If necessary, the Board should stay the effective date of BNSF’s Verified Notice of Exemption at least until it can act on UP’s petition to reject the notice. A stay is appropriate and justified to protect the integrity and efficiency of the Board’s processes. As discussed above, BNSF has manipulated the Board’s processes by obtaining a stay of UP’s abandonment of the Line based on erroneous claims about BNSF’s existing authority to operate over the Line. The Board should not allow BNSF to further complicate the abandonment proceeding by using the exemption process to obtain the authority that it claimed to already have in its filings in the abandonment proceeding. *See, e.g., SF&L Ry.*, slip op. at 2; *James Riffin d/b/a The Northern Cent. R.R. – Acquisition & Operation Exemption – In York County, PA & Baltimore County, MD*, FD 34484, slip op. at 3 (STB served April 20, 2004).

At the very least, the Board should institute a housekeeping stay so that the class exemption cannot take effect until it has sufficient time to consider fully the issues raised by this proceeding and their connection to the issues raised in the abandonment proceeding. The Board imposed a similar housekeeping stay in the abandonment proceeding.

A stay is also justified under the Board’s traditional stay criteria. The Board will grant a stay when the party seeking the stay can establish (1) there is a strong likelihood that it

will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Each of these factors is present in this proceeding.

A. UP Is Likely to Succeed on the Merits.

UP is likely to succeed on the merits of its petition to reject BNSF's notice of exemption. As discussed above, the Board is likely to find this is not a case that is appropriate for the class exemption process. This case is not routine and is not uncontroversial. It is, in fact, entirely non-routine and controversial, not only because BNSF has invoked the class exemption process to attempt to alter its authority with respect to a line that is at issue in a separate Board proceeding, but also because the Board has stayed that separate proceeding to evaluate BNSF's claim that BNSF already had the authority it is now seeking through its pending notice of exemption. As also discussed above, Board precedent establishes that a notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(7) is not an appropriate mechanism for seeking Board authority for trackage rights when the granting carrier objects. Finally, the Board is likely to find that BNSF is seeking to use the class exemption mechanism not to permit its own operations on the Line, but for the improper purpose of preventing UP from abandoning the Line.

B. UP Will Suffer Irreparable Harm in the Absence of a Stay.

Unless the Board grants a stay or rejects the notice of exemption, BNSF will obtain authority to operate over the Line effective March 22, 2012. If the Board determines that the existence of that authority prevents UP from consummating its abandonment of the Line or requires UP to institute an additional proceeding to obtain an adverse discontinuance of BNSF's

trackage rights before it may consummate the abandonment, there is no mechanism available to compensate UP for the losses it will suffer as a result. Accordingly, UP will suffer irreparable harm. *See Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925 (noting that *irreparable* harm stems from the lack of “adequate compensatory or other corrective relief [being] available at a later date”). Delay in an abandonment proceeding also forces the abandoning carrier to incur opportunity costs and is contrary to the statutory directive to expedite abandonment proceedings. *See N.Y. Cent. Lines, LLC Abandonment in Berkshire County, MA*, AB-565 (Sub-No. 3X), slip op. at 2 (STB served Sept. 5, 2001). Even if the delay is only temporary because UP ultimately obtains an adverse discontinuance, UP will have no mechanism to recover the loss of the time value of money from salvaging material from the Line or selling the Line through the offer of financial assistance process under 49 U.S.C. § 10904.¹⁰

C. No Other Interested Parties Will Be Substantially Harmed by a Stay.

A stay of the effective date of the exemption will not cause substantial harm to any interested party. UP’s filings in the abandonment proceeding show that there has been no service over the Line for more than two years. BNSF and one prospective rail shipper have made only speculative claims about potentially locating a business on the Line sometime in the future. There is no evidence suggesting that any interested party would be harmed if the Board granted a stay to address UP’s petition to reject BNSF’s notice of exemption.

D. A Stay Would Be in the Public Interest.

A stay would be in the public interest. BNSF is seeking to use the class exemption process to prevent or delay UP’s consummation of an abandonment that is consistent

¹⁰ If the Board does not grant a stay and the exemption takes effect, the Board should make clear that UP may abandon the Line as long as BNSF has not commenced operations over the Line. *See Mohall Cent. R.R. – Abandonment Exemption – In Nelson, Ramsey, & Cavalier Counties, ND*, AB-1003X, slip op. at 1 (STB served Oct. 29, 2007).

with the public convenience and necessity because it meets the requirements for an exemption under 49 C.F.R. § 1152.50. There is no traffic on the Line, there has been none for more than two years. Keeping the Line in UP's system is merely a drain on UP's resources, and is thus inconsistent with the national rail transportation policy. *See* 49 U.S.C. § 10101(3), (7).

If BNSF wants the Line for its own use, it can obtain the Line for net liquidation value by going through the offer of financial assistance process under 49 U.S.C. § 10904.

IV. CONCLUSION

For the foregoing reasons, the Board should reject BNSF's Verified Notice of Exemption. If necessary, the Board should stay the effective date of the notice until it has sufficient time to act on UP's petition to reject the notice.

Respectfully submitted,



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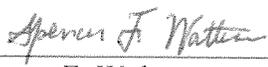
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March 15, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2012, I caused a copy of Union Pacific Railroad Company's "Petition to Reject Notice of Exemption and Request for Stay of Effective Date of Exemption" to be served by e-mail and/or first-class mail, postage prepaid on all parties of record in this proceeding and all parties of record in AB 33 (Sub-No. 277X).



Spencer F. Walters