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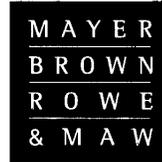
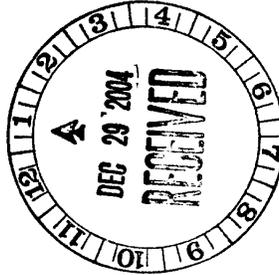
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December 29, 2004

BY HAND-DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
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Re: Finance Docket No. 34645, The Burlington Northern and
Santa Fe Railway Company -- Acquisition and Operation
Exemption -- State of South Dakota

Dear Secretary Williams:

I am writing on behalf of The Burlington Northern and Santa Fe Railway Company ("BNSF") in response to the Petition to Stay filed by the State of South Dakota (the "State") in the above-captioned proceeding. In its Petition, the State seeks to stay the Verified Notice of Exemption filed by BNSF on December 23, 2004, with respect to the acquisition and operation of the so-called "Core Lines" in South Dakota. The State asserts that BNSF's notice of exemption is procedurally inadequate in three principal respects and that the Board should stay the notice pending the resolution of a forthcoming petition to partially revoke or reject BNSF's notice that the State indicates it intends to file shortly. However, as discussed below, BNSF's notice of exemption was filed in accordance with the applicable procedural requirements, and any issues that the State may want to raise with respect to the revocation or rejection of the notice can be dealt with once any such petition for such relief is properly filed with the Board.

First, the State argues that the notice of exemption should have been filed under the 35-day procedures of 49 CFR 1150.35. Those procedures, however, are applicable only to transactions that involve the creation of Class I or Class II carriers. BNSF's acquisition and operation of the Core Lines does not involve the creation of such a carrier. The State argues that a 1992 notice of exemption filed by BNSF's predecessor (Burlington Northern Railroad Company) in *Burlington Northern Railroad Company -- Acquisition and Operation Exemption -- South Dakota Railroad Authority*, Finance Docket No. 32017 (ICC served April 2, 1992), supports its position that the 35-day procedures should apply. However, the ICC did not indicate in its decision that BN was required to follow those procedures in that case. In fact, what the ICC did indicate was that BN had properly invoked the procedures of 49 CFR Part 1150, Subpart D and that it considered the notice to be filed under 49 CFR 1150.31, the same section under which BNSF has filed its notice here. Moreover, in 1997 in *The Burlington Northern and Santa Fe Railway Company -- Acquisition and Operation Exemption -- Lac Qui Parle Regional Railroad*

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Authority, Finance Docket No. 33364 (STB served April 15, 1997), BNSF secured exemption authority under the seven-day procedure of Section 1150.31 it has used here¹.

Second, the State has argued that BNSF has failed to provide the required notice of its termination of the modified certificate operations it currently provides under 49 CFR 1150.24. BNSF has, however, committed to provide the required 60-day notice in a timely manner once it acquires title to the lines. It is immaterial whether the acquisition authority precedes such notice. All that is required is that the 60-day notice be given before operations under BNSF's notice of exemption commence.

Third, the State argues that BNSF has failed to provide the 60-day notice to labor required under 49 CFR 1150.32(e). Section 1150.32 is, however, applicable only to the creation of a Class III carrier. There is no such transaction here. Moreover, no requirement of notice to labor was imposed in either the 1992 or 1997 notices of exemption referenced above.

Finally, the State's argument that BNSF's notice of exemption should be stayed pending its contemplated petition to partially revoke or reject should be rejected. If the State is able to establish that partial revocation or rejection is justified, then the Board can order appropriate relief. It is not necessary to interfere with the state court's jurisdiction over the parties' contractual dispute as to whether BNSF is entitled to purchase the Core Lines unencumbered by the trackage rights the State wishes to grant. That is a contract matter which long-established Board precedent compels be left to the state court.

We appreciate your consideration of BNSF's views.

Sincerely,



Adrian L. Steel, Jr.

cc: Joseph H. Dettmar
Myles L. Tobin
Sarah W. Bailiff

¹ In a footnote (at 6 n.4), the State cites *Buffalo & Pittsburgh Railroad, Inc. – Operation Exemption – Lucerne Branch in Pennsylvania*, Finance Docket No. 31372 (ICC served December 16, 1988) at 2, n.3, in support of its position, but that case actually states expressly that the notice procedures at 49 C.F.R. 1150.35 do not apply when a Class I or II carrier is not created. *Id.*