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January 7, 2005

BY HAND-DELIVERY

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423-0001

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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

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Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and ten (10) copies of The Burlington Northern and Santa Fe Railway Company's Supplemental Reply to Petition for Stay. Also enclosed is a disk containing the text of the pleading.

I would appreciate it if you would date-stamp the enclosed extra copy and return it to the messenger for our files. Please let me know if you have any questions. Thank you for your assistance.

Sincerely yours,

Adrian L. Steel, Jr.

cc: Myles L. Tobin  
Sarah W. Bailiff



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 34645

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

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**SUPPLEMENTAL REPLY OF  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
TO PETITION FOR STAY**

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Dated: January 7, 2005

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 34645

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

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**SUPPLEMENTAL REPLY OF  
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TO PETITION FOR STAY**

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Pursuant to the Surface Transportation Board’s (“Board”) decision in this proceeding served December 29, 2004 (“Decision”), The Burlington Northern and Santa Fe Railway Company (“BNSF”) submits this further reply to the Petition for Stay filed by the State of South Dakota (“State”) herein. BNSF’s initial December 29, 2004 reply asserted that BNSF’s notice of exemption was filed in accordance with the applicable procedural requirements and that any issues the State wanted to raise with respect to the exemption can and should be dealt with once the State files the petition to partially revoke or reject that the State has indicated it intends to file shortly. The Board issued a housekeeping stay in its Decision to “allow the Board time to consider the issues presented in the stay petition in a more orderly fashion.” Decision at 2. Noting that BNSF “had only a few hours to respond to the stay petition,” the Board provided BNSF with this opportunity to file a further reply. Id.

As set forth below, the State has not satisfied the standards for the issuance of a stay, and its stay petition should be denied.

### Argument

As is well-established, to justify a stay, the petitioner must demonstrate: (1) a strong likelihood of prevailing on the merits; (2) irreparable harm in the absence of a stay; (3) no substantial harm to other interested parties from the stay; and (4) the public interest supports the stay. Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). A petition to stay is an “extraordinary remedy,” and consequently the petitioner must carry “the burden of persuasion on all of the elements required for such extraordinary relief.” Central Illinois Railroad Co. – Operation Exemption – Rail Line Of The City Of Peoria And The Village Of Peoria Heights In Peoria And Peoria Heights, Peoria County, IL, STB Finance Docket No. 34518 (served July 1, 2004), at 4.

The State has failed to show that it has met the standards for the issuance of a stay, and thus cannot carry its burden. Indeed, the State freely admits that it does not ultimately “anticipate opposing regulatory approval of BNSF’s acquisition of the Core Lines.” Petition for Stay, at 2. What the State wants – and what it wants to achieve by a stay – is to preclude Board approval of BNSF’s acquisition of the Core Lines (through class exemption) from becoming effective until it can seek to have the Board impose conditions on that approval which will, in the State’s view, protect the public interest. Id.

The Board has, however, recognized that the class exemption provisions of 49 CFR 1150, Subpart D contemplate “that generally transactions may be consummated prior to [the Board’s] regulatory review” and that concerns relating to the effects of an exempted transaction on communities, shippers and employees are to “be addressed through the revocation process of 49 U.S.C. 10502(d).” Iowa, Chicago & Eastern Railroad Corp. – Acquisition and Operation

Exemption – Lines of I&M Rail Link, LLC, STB Finance Docket No. 34177 (served July 22, 2002), at 9 (housekeeping stay lifted to allow acquisition to proceed with concerns about transaction to be addressed in revocation proceeding). The rationale behind this policy was explained in the Interstate Commerce Commission’s (“ICC”) decision adopting the class exemption:

In light of the explicit legislative directive to grant exemptions and then rely on after-the-fact remedies, including revocation, the potential for total or partial reimposition of regulation is always present. Accordingly, we reject protestants’ argument that an after-the-fact remedy is not satisfactory. Transactions under this class exemption involve the transfer of discrete, defined property that would not be “lost” in the property of the acquirer. Thus, any transaction could be reversed in whole or in part, and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accord with the provisions of the rail transportation policy.

Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 812 (1985). The State has not established that the concerns it has raised cannot be addressed in its forthcoming revocation proceeding, much less that it is likely to prevail in that proceeding. Accordingly, its stay petition should be denied.

**1. The State Has Failed to Establish That It Has a Strong  
Likelihood of Prevailing on the Merits**

In support of its argument that it will prevail on the merits, the State first cited three alleged procedural defects in BNSF’s notice. BNSF responded to those allegations in its December 29 letter and showed that the notice was properly filed. There are, however, two additional points to be made which confirm this conclusion.

First, the regulatory history to 49 CFR Part 1150, Subpart D makes it clear that the 35-day procedures of 49 CFR 1150.35 only apply “in transactions that will create new Class I and Class II carriers.” Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and

Operation of Rail Lines Under 49 U.S.C. § 10901, 4 I.C.C.2d 309, 311 (1988). If no such transaction is proposed, then the seven-day procedures of 49 CFR 1150.32-.34 apply. See Buffalo & Pittsburgh Railroad, Inc. – Operation Exemption – Lucerne Branch in Pennsylvania, ICC Finance Docket No. 31372 (decided Dec. 16, 1988), at 2 n.3.<sup>1</sup> Second, the regulatory history reveals that the 60-day labor notice requirement of 49 CFR 1150.32(e) applies only to “notices of exemption from the requirements of . . . 49 U.S.C. 10901 by noncarriers, to acquire or operate rail lines . . .” Ex Parte No. 562, Acquisition of Rail Lines Under 49 U.S.C. 10901 and 10902 – Advance Notice of Proposed Transactions, 2 S.T.B. 592, 592 (1997). Thus, as set forth in BNSF’s December 29 letter and here, the alleged procedural defects cited by the State do not support the entry of a stay.<sup>2</sup>

Apart from its failed attempt to allege procedural defects, the State asserts that it will prevail on the merits of its partial revocation petition. The State cannot, however, support its claim. “The party seeking revocation has the burden of proof and petitions to revoke must be based on *reasonable, specific concerns* demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary.” Portland & Western Railroad, Inc. –

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<sup>1</sup> In its December 29 letter, BNSF asserted that the State’s reliance on a 1992 notice of exemption where BN followed the 35-day procedures was misplaced and that BNSF filed a notice of exemption in 1997 using the seven-day procedures. Upon now having had the opportunity to review more fully the 1997 proceeding, BNSF has determined that its notice was filed using the 35-day procedures. Nonetheless, in both 1992 and 1997, the ICC and the Board, respectively, did not indicate that BN/BNSF was required to follow those procedures but only that it considered the notice to have been filed under 49 CFR 1150.31, the same section under which BNSF filed its notice here.

<sup>2</sup> To the extent that the Board should determine that, notwithstanding the limitations to the applicability of 49 CFR 1150.32(e) and 1150.35 discussed above, the labor notice and 35-day procedures should apply, BNSF requests a waiver from their application. The notice purpose of the sections has, as can be seen by the State’s active involvement here, been met, and there will be no labor impacts. Thus, no further purpose would be served by applying the sections at this point.

Acquisition And Operation Exemption – The Burlington Northern And Santa Fe Railway

Company, STB Finance Docket No. 33424 (served July 6, 1998), at 1-2 (emphasis added). To the extent the State seeks to make this showing based on its claims that BNSF is obligated by the parties' contract to allow trackage rights operations on the Core Lines, that issue will be resolved by the state courts of South Dakota, and revocation relief will not be necessary.

Further, the State asserts in its petition for stay that, even apart from any contractual obligation BNSF may have to allow access by other carriers to the Core Lines, it will seek relief in its revocation petition that would provide such access pursuant to 49 U.S.C. 10901 and the Rail Transportation Policy of 49 U.S.C. 10101. See Petition for Stay, at 13 (“The State’s petition for partial revocation will seek to . . . requir[e] imposition of the MRC/Dakota Southern and Sioux Valley/D&I trackage rights as a condition of the sale.”) However, BNSF provides the only service over the Core Lines, and the situation with respect to competition and shipper access will not be changed by BNSF’s purchase of the Lines. While the State may not like the existing access situation, relief such as the State seeks in the form of increased access is not available in a revocation proceeding absent adverse competitive harm resulting from the transaction.

Thus, in Portland & Western Railroad, Inc. – Lease and Operation Exemption – Lines of Burlington Northern Railroad Co., STB Finance Docket No. 32766 (served Oct. 15, 1997), at 6, the Board stated:

The Board and the Interstate Commerce Commission have consistently held that carriers are not obligated to increase the existing level of competition when they undertake sale or lease transactions such as this one. *See, e.g., Montana Rail Link, Inc.-- Exemption, Acquisition and Operation--Certain Lines of Burlington Northern Railroad Company, Finance Docket No. 31089 (ICC served May 26, 1988) and South Carolina Central Railroad Company, Inc.--Purchase and Lease--CSX Transportation, Inc., Lines in Georgia and Alabama, Finance Docket No. 31360 (ICC served May 4, 1989).*

Further, in Montana Rail Link, Inc. – Exemption, Acquisition And Operation – Certain Lines of Burlington Northern Railroad Co., ICC Finance Docket No. 31089 (served May 26, 1988), at 20-21, the ICC stated, in ruling on a petition to revoke, that its concerns are “with the competitive aspects flowing from the transaction itself” and held that, “because . . . this transaction will not reduce competition, there is no need for us to impose any restrictions or conditions here.” Accordingly, the State has not shown that it will likely prevail on the merits. Indeed, it will fail pursuant to established precedent.

The weakness of the State’s position is particularly apparent in light of the Board’s and ICC’s consistent policy, since passage of the Staggers Rail Act of 1980, of encouraging “the development of new and innovative rail operations” through the class exemption from the formal requirements of Section 10901. Wisconsin Central Ltd. – Exemption, Acquisition And Operation – Certain Lines of Soo Line Railroad Co., ICC Finance Docket No. 31102 (decided July 8, 1988), at 3. BNSF seeks in the pending state court contract action to enforce an option that it acquired as part of its overall agreement with the State to provide service over lines that had been abandoned after years of unprofitable operations. The Board is highly unlikely to find that BNSF should be deprived of the benefit of its bargain, on regulatory grounds, where BNSF undertook at substantial risk the very kind of “new and innovative rail operations” that deregulation under the Staggers Act was designed to encourage.

The Board has made clear that, in the absence of “sufficient evidence” to establish a likelihood of success on the merits, as here, a stay is improper; rather, “[t]his issue is best reserved for disposition in connection with consideration of a petition to revoke the exemption, where a more complete record may be analyzed.” C & C Railroad, Inc. – Operation Exemption – Centerpoint Properties, LLC, STB Finance Docket No. 33990 (served Jan. 8, 2001), at 2. See

also SF&L Railway, Inc.– Acquisition And Operation Exemption –Toledo, Peoria And Western Railway Corp. Between La Harpe And Peoria, IL, STB Finance Docket No. 33995, and Kern W. Schumacher And Morris H. Kulmer – Continuance In Control Exemption –SF&L Railway, Inc., STB Finance Docket No. 33996 (served Jan. 26, 2001), at 3 (“By allowing the transaction to go forward, the petitioner and the Board will acquire hard evidence of operations – efficient or inefficient – under the new arrangement. . . . And the merits of [petitioner’s] arguments can be dealt with more fully on a record developed in connection with a petition for revocation.”).

## 2. **Irreparable Harm**

“An administrative order is not ordinarily stayed without an appropriate showing of irreparable harm.” Consolidated Rail Corp. – Abandonment – Between Corry and Meadville, In Erie and Crawford Counties, PA, ICC Docket No. AB-167 (Sub-No. 1139) (served Oct. 5, 1995), at 19 (citing Permian Basin Area Rate Cases, 390 U.S. 747, 777 (1968)). That showing must “demonstrate that the injury claimed is imminent, ‘certain and great’”; a mere assertion of “speculative harm is not enough to support relief.” Id. (quoting Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C.Cir.1985))

Initially, there will be no harm to the shippers on the Core Lines if the stay is denied since BNSF is currently the only rail carrier serving those shippers, and the shippers’ service and competitive access will not be changed as a result of the exempted transaction.

In addition, the fact that the state court will not resolve the contract dispute anytime soon is alone sufficient to defeat the State’s claim that it will suffer irreparable harm without a stay.<sup>3</sup> “Prior ICC and court precedent makes clear that the threat of harm warranting a stay must be

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<sup>3</sup> At the January 6, 2005 hearing held in the litigation pending in South Dakota state court between the parties over BNSF’s purchase option, the court set trial for late September 2005.

*both irreparable and imminent.*” Sault Ste. Marie Bridge Co. – Acquisition And Operation Exemption – Lines Of Union Pacific Railroad Company, STB Finance Docket No. 33290 (served Jan. 24, 1997), at 5 (emphasis added; citations omitted). The State has not shown, and cannot show, that its claimed injury is “imminent, certain and great” (Consolidated Rail Corp., at 19 (citation and internal quotation marks omitted)) under these circumstances.

The availability of the revocation procedure itself further assures that the State will not be irreparably harmed without a stay. The State “can promptly file a petition to revoke [the railroad’s] exemption,” and its “arguments . . . can be evaluated in the revocation proceeding.” Raritan Central Railway, LLC – Operation Exemption – Heller Industrial Parks, Inc., STB Finance Docket No. 34514 (served June 25, 2004), at 4. Indeed, because the transaction which the notice of exemption would authorize will not occur before at least September of this year, there will be adequate time for the Board to consider the State’s petition.

The ICC has said as much in rejecting a state agency’s petition to stay based on “competitive concerns.” Montana Rail Link, Inc. – Exemption, Acquisition And Operation – Certain Lines Of Burlington Northern Railroad Company, ICC Finance Docket No. 31089 (decided July 30, 1987), 1987 ICC Lexis 200 at \*9. The ICC explained that, because the class exemption “expressly provided” for the ICC “to require divestiture to avoid abuses of market power resulting from [a] transaction,” *id.* (quoting Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1986)), the state agency’s “generalized competitive concerns can be considered after the effective date” of the exemption. *Id.* Accordingly, a stay was unwarranted, because the state agency “should follow the normal avenue for relief by submitting a petition to revoke the exemption as to this transaction.” *Id.* Thus, as the U.S. Supreme Court has explained, “[t]he

Youngstown, OH, And Darlington, PA, In Mahoning And Columbiana Counties, OH, And Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2x) and Railroad Ventures, Inc. – Acquisition And Operation Exemption – Youngstown & Southern Railroad Co. Request To Set Terms And Conditions, STB Finance Docket No. 33385 (served Jan. 7, 2000), at 6.

#### **4. Public Interest**

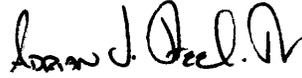
Finally, “it is in the public interest to allow the class exemption process to move forward pursuant to the rules adopted by this Commission in implementing the national transportation policy.” Montana Rail Link, Inc. – Exemption, Acquisition And Operation – Certain Lines Of Burlington Northern Railroad Company, ICC Finance Docket No. 31089 (decided July 30, 1987), 1987 ICC Lexis 200 at \*9. Long-standing precedent has rejected petitions to stay because the public interest would not be served by an attack on the exemption procedure: “Congress intended the Commission’s exemption power to be ‘an important cornerstone of a new, flexible approach to regulating the rail industry.’ . . . Imposing a stay would deny the Commission, the railroads, and the shipping public the very flexibility that Congress intended to confer.” Bradford Industrial Rail, Inc. – Acquisition And Operation Exemption – Consolidated Rail Corp.; Genesee & Wyoming Industries, Inc. – Continuance In Control Exemption – Bradford Industrial Rail, Inc., ICC Finance Docket Nos. 32240 and 32241 (served Feb. 9, 1993), at 8 (quoting Simmons v. ICC, 697 F.2d 326, 333 (D.C. Cir. 1982)).

#### **Conclusion**

For the reasons set forth in BNSF’s December 29, 2004 letter and above, the State’s petition for stay should be denied. BNSF’s notice of exemption was properly filed, and the State has failed to meet the standards required for the extraordinary relief of a stay. This is particularly so in light of the fact that the parties’ South Dakota state court litigation is not set for trial until

September 2005, and there is no possibility of any harm whatsoever to the State from allowing BNSF's notice of exemption to become effective.

Respectfully submitted,



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January 7, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on the following by first-class mail or a more expeditious manner.

  
\_\_\_\_\_

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