

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35352

**NEBKOTA RAILWAY, INC. & WEST PLAINS CO. – PETITION FOR
DECLARATORY ORDER**

**REPLY OF DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION TO
NEBKOTA RAILWAY, INC.’S REQUEST FOR A PROCEDURAL DECISION**

Dakota, Minnesota and Eastern Railroad Corporation (“DM&E”) submits this Reply to Nebkota Railway, Inc.’s (“Nebkota’s”) and West Plains Co.’s (“West Plains”) (collectively, “Petitioners”) request “that the Board issue a procedural decision for the taking of additional evidence and argument” in the above-captioned proceeding. *See* Letter filed by Nebkota Railway, Inc. and West Plains Co., STB Finance Docket No. 35352 (Mar. 17, 2010) (“Request”). It is not at all clear what “additional evidence and argument” Petitioners believe should be submitted in this proceeding, or why Petitioners “intend to continue prosecution” of their Petition for Declaratory Order in Docket No. 35352 (“Declaratory Order Petition”), particularly in light of the fact that they have withdrawn their related petition to reject the exemption in Docket No. 35346. What is clear is that both Petitioners’ Request and their Declaratory Order Petition are predicated on factual assertions that are plainly incorrect, and are, in any event, moot. Both should be denied.

The instant proceeding in Docket No. 35352 (the “Declaratory Order Proceeding”) is intertwined with the proceedings in Docket No. 35346 (the “Exemption Proceeding”), and as a result a summary of the procedural history may be helpful. On January 25, 2010, the Nebraska Northwestern Railroad (“NNW”) filed a Verified Notice of Class Exemption in the Exemption

Proceeding for a transaction between DM&E and NNW regarding a 28.1 mile low-density DM&E line in Dawes County, NE between MP 404.5 near Chadron, NE and MP 432.6 near Crawford, NE (the “Line”). NNW and DM&E agreed that NNW would purchase an approximately seven-mile segment of the Line and would lease and operate an approximately twenty-one mile segment of the Line. On February 5, 2010, Petitioners filed a Joint Petition For Rejection or Stay of Class Exemption in the Exemption Proceeding (“Petition to Reject”). A week later on February 12, they instituted the Declaratory Order Proceeding by filing the Declaratory Order Petition.¹ In both proceedings, Petitioners’ major complaint was that the transaction allegedly would cause the “loss of [Nebkota’s] direct connection to DME at Dakota Junction” and thereby permit NNW to unfairly profit by interposing itself between Nebkota and DM&E. Petition to Reject at 8; *see* Declaratory Order Petition at 2.

As explained in DM&E’s Reply to Nebkota’s Petitions, Petitioners’ complaint was unfounded. Nebkota will not lose its ability to interchange traffic with DM&E as a result of the transaction. *See* DM&E Reply at 4 (filed Feb. 19, 2010) Indeed, DM&E offered to amend its trackage rights agreement with Nebkota to confirm that, after the transaction was consummated, Nebkota would have the continued right to interchange traffic with DM&E. *See id.* at 5 & Ex. A. Petitioners subsequently withdrew their petition in the Exemption Proceeding, explaining that they were doing so “in light of the Amendment of the Trackage Rights Agreement between Dakota, Minnesota & Eastern Railroad Corporation (DM&E) and Nebkota Railway, Inc. to provide for interchange with DM&E at Dakota Junction.” *See* Letter filed by Nebkota Railway, Inc. and West Plains Co. in Docket No. 35346 (Feb. 22, 2010). The Board granted Petitioners

¹ Petitioners were not done. On February 17 they filed a “Supplement” with the Board alleging that the exemption should be rejected because Petitioners had not been given access to confidential contracts between NNW and DM&E.

leave to withdraw their petition, and the exemption became effective on February 24, 2010. NNW and DM&E consummated the transactions authorized by the exemption on March 31, 2010, and NNW will begin operations on the Line at 12:00 AM April 1, 2010.

Now, long after they withdrew their petition in the Exemption Proceeding, Petitioners inform the Board that they “intend to continue prosecution of the Petition in Docket No. 35352” and ask the Board to issue an order to govern “the taking of additional evidence and argument” in the Declaratory Order Proceeding. Request at 1. This Request should be denied, and the Declaratory Order Petition should be dismissed, for three reasons.

First, the Request and Petition are moot. The Board will only institute a declaratory order proceeding where it is necessary “to terminate a controversy or remove uncertainty.” *Vermont Ry.—Pet. for Declaratory Order*, STB Finance Docket No. 34364 (Jan. 3, 2005). Here, the only “controversy” alleged by the Petition was the specific NNW-DM&E transaction at issue in the Exemption Proceeding. As Petitioners stated in the first sentence of the Declaratory Order Petition, they sought “a Declaratory Order to terminate controversy and remove uncertainty with respect to the rights of Petitioners and those of [NNW] and [DM&E] regarding the competitive impact and public interest of a proposed purchase by NNW of a 7.22-mile rail line from DM&E and the lease by NNW of a 20.88-mile rail line also from DM&E.” Declaratory Order Petition at 1. There is now no “uncertainty” or “controversy” about the rights of Petitioners (who have secured written confirmation of Nebkota’s continuing right to interchange traffic with DM&E), NNW or DM&E in relation to this transaction. The exemption for the transaction is effective, and the transaction itself has been consummated. Even if the Declaratory Order Petition otherwise raised sufficient grounds to justify initiating a declaratory order proceeding (and it did not), those grounds are moot now that NNW has completed its purchase and lease of the Line.

Second, the factual predicates of the Declaratory Order Petition are wrong. As stated above, it is not true that the transaction would preclude Nebkota from interchanging traffic with DM&E – indeed, Nebkota admitted as much when it withdrew its petition in the Exemption Proceeding. Similarly false are Petitioners’ allegations that NNW does not intend to be a bona fide railroad. NNW’s Reply to the Declaratory Order Petition included a sworn verified statement from NNW’s Manager - Administration that detailed the steps that NNW has taken in anticipation of assuming its common carrier obligations and plainly stated that “NNW fully intends to become a common carrier railroad and provide rail transportation service to patrons.” V.S. of George LaPray, NNW Reply to Declaratory Order Petition at 2; DM&E Reply at 10-11. In the face of this sworn testimony disproving the allegations of the Declaratory Order Petition, it is difficult to understand why Petitioners “intend to continue prosecution” of their Petition. Regardless, the Declaratory Order Petition is based upon a misapprehension of the facts and no further proceedings on that Petition are warranted.

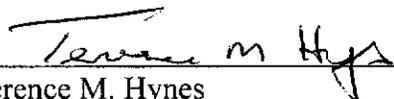
Finally, the Request should be rejected because the Declaratory Order Petition is an unwarranted attempt to revise long-established agency precedent. *See* DM&E Reply at 11. The Declaratory Order Petition would have the Board rewrite the class exemption for acquisitions that create Class III carriers to require acquiring carriers to meet four additional criteria. *See* Declaratory Order Petition at 6. This would constitute a sweeping revision of 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 (1985) – an exemption that has in part been responsible for the revival of the short line rail industry over the past two decades. Petitioners do not identify any generally-applicable problems that justify reopening this settled precedent and increasing regulatory burdens on new short line carriers. Instead, Petitioners simply repeat their false

claims about the DM&E/NNW transaction – claims that they effectively disavowed by their actions in the Exemption Proceeding. There is no reason to grant Petitioners’ Request for additional “evidence and argument” to pursue this misguided Petition.

* * *

For the foregoing reasons and those stated in DM&E’s and NNW’s replies to the Petition for Declaratory Order, the Board should deny Petitioners’ request for a procedural decision and its Petition for Declaratory Order.

Respectfully submitted,



Terence M. Hynes
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (Fax)

Attorneys for Dakota, Minnesota & Eastern Railroad Corporation

Dated: March 31, 2010

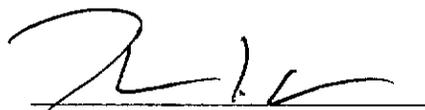
CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Reply of the Dakota, Minnesota, and Eastern Railroad Corporation to be served by first class mail, postage prepaid, this 31st day of March 2010 on the following counsel of record:

Michael W. Blaszak
211 South Leitch Avenue
La Grange, Illinois 60525-2162

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South LaSalle Street, Suite 1890
Chicago, Illinois 60604-1112

Paul M. Donovan
Laroe, Winn, Moerman & Donovan
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036



Matthew J. Warren