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September 6, 2018

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BY HAND DELIVERY

Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings
September 6, 2018
Part of
Public Record

Re: Finance Docket No. 36222, BNSF Railway Company—Lease Exemption—Union Pacific Railroad Company

Dear Ms. Brown:

Attached for filing are the original and ten copies of a Petition for Exemption under 49 C.F.R. § 1121, a disc containing the Petition and a check covering the \$7,800 filing fee.

Please time and date stamp the extra copy of the Petition and return it with our messenger.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Peter W. Denton', with a long horizontal line extending to the right.

Peter W. Denton
Attorney for BNSF Railway Company

Enclosures
FEE RECEIVED
September 6, 2018
SURFACE
TRANSPORTATION BOARD

FILED
September 6, 2018
SURFACE
TRANSPORTATION BOARD

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 36222

BNSF RAILWAY COMPANY
—LEASE EXEMPTION—
UNION PACIFIC RAILROAD COMPANY

PETITION FOR EXEMPTION

EXPEDITED CONSIDERATION REQUESTED

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Dated: September 6, 2018

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 36222

BNSF RAILWAY COMPANY
—LEASE EXEMPTION—
UNION PACIFIC RAILROAD COMPANY

PETITION FOR EXEMPTION

EXPEDITED CONSIDERATION REQUESTED

BNSF Railway Company (“BNSF”) hereby petitions the Surface Transportation Board (the “Board”), pursuant to 49 U.S.C. § 10502(a) and the applicable rules at 49 C.F.R. Part 1121, for an exemption from the prior review and approval provisions at 49 U.S.C. §§ 11323-11325 for BNSF to lease for maintenance, construction, renewal, and repair purposes an approximately 13.62-mile rail line owned by Union Pacific Railroad Company (“UP”) located between MP 591.66 at NA Junction and MP 605.28 at Avondale (Nyberg), in Pueblo County, Colorado (the “Line”). A map showing the Line is attached as Exhibit A.

As demonstrated below, exemption of this transaction is clearly warranted under the relevant standards of Section 10502. Furthermore, BNSF respectfully requests expedited consideration of this Petition, so that BNSF may begin maintenance work by November 1, 2018.

BACKGROUND

In 1967, BNSF’s predecessor, The Atchison, Topeka and Santa Fe Railway Company (“ATSF”) and UP’s predecessor, Missouri Pacific Railroad Company (“MP”), entered into an agreement relating to ownership and operation, maintenance and joint use of ATSF’s and

MP's railroad tracks and facilities between NA Junction and Pueblo, Colorado, which includes the Line (the "Joint Trackage Rights Agreement").

Under the Joint Trackage Rights Agreement, BNSF and UP have jointly operated the Line for the last fifty years and UP has had responsibility for maintaining the Line. BNSF is the predominant user of the Line and currently dispatches the Line. BNSF and UP have recently entered into a lease agreement that will modify certain roles and responsibilities set forth in the Joint Trackage Rights Agreement (the "Lease"). BNSF will non-exclusively lease the Line in order for BNSF to maintain, construct, repair and renew the Line's track and appurtenant structures and facilities.

The Lease will align track and signal maintenance duties with BNSF's current dispatching responsibilities, enhancing operational efficiency, planning and coordination. BNSF maintains the contiguous lines on either side of the Line, which are also operated jointly by BNSF and UP. Under the Lease, maintenance activities on both the Line and its contiguous lines will be coordinated in tandem to reduce operational impacts to the through route.

Ultimately, the more contiguously aligned track and signal maintenance and dispatching responsibilities will reduce the number and frequency of maintenance windows and outages, resulting in improved operations for customers along the route. The improved operations will, in turn, improve regional efficiencies, directly affecting the flow of traffic on the national rail system. The improved maintenance coordination will enable BNSF and UP to improve their respective operations over the Line which, in turn, will improve operations over other portions of their networks.

In short, the Lease will produce a more efficient rail operation and will benefit all users of the Line and all shippers whose traffic traverses the Line, while having no effect on competitive access to customers.

ARGUMENT

The Lease is subject to prior review and authorization by the Board. *See* 49 U.S.C. § 11323(a)(2). However, the Board must exempt the Lease from these prior review and authorization requirements if the Board finds that the application of the requirements:

(1) is not necessary to carry out the transportation policy of [49 U.S.C. § 10101]; and

(2) either—(A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10502(a). In enacting Section 10502, Congress intended that the Board should liberally use its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. *See* H.R. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980); H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69 (1995).

The Board, pursuant to Section 10502, recently exempted from the prior approval requirements of Sections 11323-25 similar lease transactions between BNSF and UP that were intended to bring geographic consistency to the parties' maintenance obligations over joint trackage owned by each of the parties. *See BNSF Ry. Co.—Lease Exemption—Union Pac. R.R. Co., et al*, FD-35895, *et al* (STB served Apr. 20, 2015) (“2015 Lease Exemption”). As discussed below, the Board should grant this Petition and exempt the Lease for the same reasons.

A. The Board need not apply the prior approval requirements of Sections 11323-25 to the Lease in order to carry out the rail transportation policy of Section 10101.

With respect to the first prong of the Section 10502(a) exemption standard, it is clear that the Board need not apply the prior approval requirements of Sections 11323-25 to its evaluation of the Lease in order to carry out the transportation policy of Section 10101. The scope of the Board's analysis under this first prong is a "function of the relationship between the section from which exemption is sought, here [§§ 11323-25], and the Rail Transportation Policy enumerated in § 10101." *Alaska Survival v. STB*, 705 F.3d 1073, 1083 (D.C. Cir. 2013) (quoting *Vill. of Palestine v. ICC*, 936 F.2d 1335, 1338-39 (D.C. Cir. 1991)).

1. Consistent with the standard in Section 11324(d), the Lease will have no adverse competitive impacts.

Unless the Board grants this Petition, BNSF must file an application seeking Board authority to enter into the Lease. *See* 49 U.S.C. § 11324(a); 49 C.F.R. Part 1180. Because the Lease does not involve the merger or control of two Class I railroads, the Board would need to approve any such application *unless* the Board were to find *both* that:

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11324(d).

In transactions subject to Section 11324(d), the Board focuses primarily on the anticipated competitive effects of the proposed transaction. *See, e.g., Norfolk S. Ry. Co.—Acquisition & Operation—Certain Rail Lines of the Del. & Hudson Ry. Co.*, FD 35873, slip op. at 14 (STB served May 15, 2015). The Board "must approve" any such application

“unless there will be adverse competitive impacts that are both ‘likely’ and ‘substantial.’”

Id. Even if the Board does make such findings, the Board “may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions.” *Id.*

The Lease will have no adverse competitive impacts. As discussed above, the Lease will accommodate continued joint operation of the Line by both UP and BNSF and allow BNSF to maintain the Line more efficiently by aligning track and signal maintenance with dispatching and further aligning maintenance of the Line with BNSF’s maintenance activities on contiguous lines on either side of the Line. BNSF and UP operations and commercial access over the Line will continue as they do today. Aside from enhancement of operational efficiency of the Line, no other impacts to commercial or operational access to customers, either locally or in through service, will result from the transaction. Therefore, the Lease meets the otherwise applicable approval standards set forth in Section 11324(d).

2. Detailed scrutiny of the Lease is not necessary to carry out the rail transportation policy of Section 10101.

Because the Lease is consistent with the otherwise applicable standard in Section 11324(d) and will have no adverse competitive impacts, the Board need not subject the Lease to the prior approval requirements of Sections 11323-25 in order to carry out the rail transportation policy of Section 10101.

As discussed above, the Lease will align track and signal maintenance with dispatching responsibilities currently held by BNSF, the predominant user of the Line, and is intended to streamline maintenance activity and improve planning processes in coordination with BNSF maintenance of adjoining line segments.

Therefore, the Lease will promote a safe and efficient transportation system (49 U.S.C. § 10101(3)), ensure continuation of a sound rail transportation system with effective

competition among rail carriers (§ 10101(4)), foster sound economic conditions in transportation and ensure effective competition (§ 10101(5)), encourage honest and efficient management (§ 10101(9)), and promote energy conservation (§ 10101(14)). Further, an exemption from the application process of Sections 11324 and 11325 will expedite regulatory action (§ 10101(2)) and reduce regulatory barriers to entry and exit (49 U.S.C. § 10101(7)). Other aspects of the rail transportation policy will not be adversely affected. *See 2015 Lease Exemption*, slip op. at 3.

B. The Board need not apply the prior approval requirements of Sections 11323-25 to the Lease in order to protect shippers from the abuse of market power, and the Lease is of limited scope.

Under the second prong of the Section 10502(a) exemption standard, in order to exempt the Lease, the Board must find *either* that (1) the Board need not apply the prior approval requirements of Sections 11323-25 to the Lease in order to protect shippers from the abuse of market power, *or* (2) the Lease is of limited scope.¹ The Lease clearly satisfies each of these standards.

As discussed above, the Lease will align track and signal maintenance with dispatching responsibilities currently held by BNSF, the predominant user of the Line, and is intended to enhance maintenance activity planning and coordination, thereby improving operational efficiency on the Line and its through route. BNSF already has long-term operating rights over the Line, so the Lease will not affect the routings available to customers located on the Line or customers routing their traffic over the Line. BNSF and UP do not anticipate any material changes in operations following the consummation of the Lease. Consequently, no current or future customers will see any change in competitive rail

¹ When the Board finds that regulation of a transaction is not necessary to protect shippers from the abuse of market power, the Board has found that it “need not determine whether the proposed transactions are limited in scope.” *See, e.g., 2015 Lease Exemption*, slip op. at 4 n.3.

service from BNSF or UP over the Line, nor will any service be degraded as a result of the Lease. BNSF and UP trains will continue to run as they do today, although possibly faster following the improved maintenance on the Line. In short, the Lease will have no adverse impact on the national, regional, or local rail industry.

For these reasons, regulation of the Lease is not necessary to protect shippers from the abuse of market power. *See 2015 Lease Exemption*, slip op. at 4. Additionally, for these reasons and because the Line is only 13.62 miles long, the Lease is of limited scope.²

EXPEDITED CONSIDERATION REQUESTED

BNSF respectfully requests that the Board process this Petition as expeditiously as possible, and to issue a decision granting the Petition effective by November 1, 2018 or sooner. This will allow BNSF to plan for and commence maintenance work necessary to remove slow orders and improve track conditions before winter weather conditions significantly impact maintenance activities in this area of the country.

BNSF and UP have reached mutual agreement on the terms of the Lease, which will enable BNSF to more efficiently maintain the Line and coordinate necessary rehabilitation projects for the Line. The Line currently suffers from multiple slow orders (ballast issues, tie issues, rail issues, etc.). The route that includes the Line connects coal sources with energy-producers across the western United States. Expeditiously reducing the number of slow orders will have a direct effect on the speed and reliability of the route, ensuring

² The Board and its predecessor have found the acquisition and operation of vastly longer rail lines to be limited in scope. *See, e.g., Ind. R.R. Co.—Acquisition & Operation—Ill. Cent. R.R. Co.*, 6 I.C.C.2d 1004, 1011 (1990) (acquisition of 90.3 miles of rail line found limited in scope); *Mid Mich. R.R. Co.—Purchase Exemption—The St. Joseph & Grand Island R.R. Co. Line Between St. Joseph, MO and Upland, KS*, FD-31482 (ICC served Aug. 7, 1989) (acquisition of 107.3 miles of rail line found limited in scope); *Genesee & Wy. Indus., Inc.—Continuance in Control Exemption—Allegheny & E. R.R., Inc.*, FD-32149 (ICC served Oct. 23, 1992) (acquisition of control of carrier operating 147.1 miles of rail line and serving eight customers found limited in scope).

energy producers have sufficient stockpiles on hand to supply customer needs when unexpected weather conditions occur.

LABOR PROTECTION

Under 49 U.S.C. § 10502(g), the Board may not use its exemption power to relieve a rail carrier of its statutory obligation to protect the interests of employees. Therefore, as a condition to granting the exemption, BNSF has no objection to the Board imposing the employee protective conditions set forth in *Norfolk & W. Ry.—Trackage Rights—Burlington N., Inc.*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry. Inc.—Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980).

INTERCHANGE COMMITMENTS

Pursuant to 49 C.F.R. § 1121.3(d), BNSF hereby certifies that the Lease does not contain a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means. Accordingly, the disclosure requirements of 49 C.F.R. § 1121.3(d) are inapplicable.

ENVIRONMENTAL AND HISTORIC IMPACTS

Pursuant to 49 C.F.R. § 1121.3(b), this Petition must comply with environmental or historic reporting and notice requirements of 49 C.F.R. Part 1105, if applicable. In this case, none of these requirements are applicable.

BNSF is leasing the Line in order to accommodate BNSF's assumption of track and signal maintenance responsibilities for the Line. Joint rail operations over the Line will continue as they are today. Further, Board approval is required for BNSF and UP to abandon the Line or discontinue any service over the Line, and there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older as a

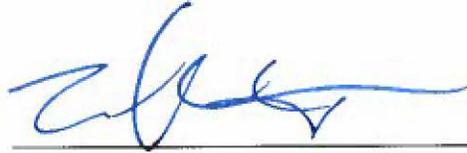
result of this transaction. Therefore, this Petition does not require an historic report under 49 C.F.R. § 1105.8(b)(1).

The Lease will not result in significant changes in carrier operations. There will not be a diversion of: (1) more than 1,000 rail carloads a year to motor carriage; or (2) an average of 50 carloads per mile per year for any part of this line to motor carriage. The Lease will not result in: (1) an increase in rail traffic of at least 100 percent or an increase of at least eight trains a day on any segment of the Line; (2) an increase of rail yard activity of at least 100 percent; or (3) an average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day. The Lease will not affect a Class I or nonattainment area under the Clean Air Act. In any event, the thresholds of 49 C.F.R. § 1105.7(e)(5)(ii) will not be exceeded. Finally, the transportation of ozone depleting materials is not contemplated. Therefore, no environmental documentation is required under 49 C.F.R. § 1105.6(c)(2).

CONCLUSION

The Board need not apply the prior approval requirements of Sections 11323-25 to the Lease in order to (1) carry out the rail transportation policy of Section 10101, or (2) protect shippers for the abuse of market power. Furthermore, the Lease is of limited scope. Therefore, BNSF respectfully requests that the Board, pursuant to Section 10502(a), exempt the Lease from the prior approval requirements of Sections 11323-25. Finally, BNSF respectfully requests that the Board issue a decision granting this Petition effective by November 1, 2018 or sooner, to enable BNSF to plan for and commence maintenance work before the winter.

Respectfully submitted,



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