

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34330

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
— ACQUISITION AND OPERATION EXEMPTION —  
MONTANA WESTERN RAILWAY COMPANY, INC.

Decided: June 20, 2003

By petition filed on March 25, 2003, The Burlington Northern and Santa Fe Railway Company (BNSF) seeks an exemption pursuant to 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 11323-25 to acquire the interest of the current operator and to operate a 52-mile line of railroad extending from Garrison to Butte, MT (the line). The current operator is Montana Western Railway Company, Inc. (MWR), a Class III carrier and lessee of the line,<sup>1</sup> which is owned by the Oregon Short Line Railroad (OSLR), a subsidiary of Union Pacific Railroad Company (UP). BNSF requested expedited handling of its petition.<sup>2</sup>

BACKGROUND

BNSF's predecessor, Burlington Northern Railroad Company (BN), formerly operated the line pursuant to a 999-year lease between BN and OSLR, which was executed on August 1, 1886, by OSLR's and BN's predecessors in interest (lease agreement). In an agreement dated August 4, 1986, BN agreed to sell all of its rights, title and interest in the line, including all of BN's interest under the lease agreement, to MWR. BNSF states that it seeks to reacquire this interest and operate the line to ensure that shippers using the line will continue to receive quality common carrier service. According to BNSF, MWR's owners believe that, based on the current level of traffic over the line, there is a risk that the condition of the line and MWR's service could deteriorate in the future. Therefore, BNSF and MWR have entered into an agreement dated March 11, 2003, pursuant to which MWR has agreed to transfer and BNSF has agreed to reacquire all of the rights, title and interest in the line, including all of

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<sup>1</sup> See Montana Western Railway Company, Inc. — Acquisition and Operation Exemption — Burlington Northern Railroad Company, Finance Docket No. 30888 (ICC served Sept. 12, 1986).

<sup>2</sup> The original reply deadline of April 14, 2003, was extended to June 2, 2003, at the request of Louisiana-Pacific Corporation (LPC), a shipper on the line, and UP. Otherwise, expedited handling has been given to the petition.

the interests under the lease agreement.

BNSF states that it will continue to provide common carrier service to shippers located on the line at competitive rates and that there will be no material change in the service those shippers receive. BNSF submits that the shippers can continue to interchange their products as they did previously either at Garrison on the north end, interchanging with Montana Rail Link (MRL), or at Silver Bow on the south end, interchanging with UP. Additionally, BNSF asserts that bridge traffic currently moving over the line can continue, and that the existing commercial relationships among connecting carriers, Rarus Railroad Company, BNSF, and MRL, will not materially change as a result of the transaction.

In comments filed on April 14, 2003, MRL supports this transaction in view of BNSF's commitment, in its petition, to maintain service and competition, and its agreement to amend certain contracts between MRL and BNSF.<sup>3</sup> MRL assumes that BNSF's omission of MWR from the list of commercial relationships that would not materially change as a result of this transaction is inadvertent and requests that this point be clarified. Based on the petition, it appears that BNSF intends to continue, without material change, all of MWR's commercial relationships. Other comments received include letters filed by Northwest Petroleum Company, Propane Services, Inc., Triple S Building Center, and Mike Mansfield Advanced Technology Center, expressing concern about BNSF maintaining the current level of rail rates and service on the line. Finally, on June 2, 2003, UP filed a letter stating that it has entered into a settlement agreement with BNSF that resolves UP's concerns with the transaction and that it supports BNSF's petition.<sup>4</sup>

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502, the Board must exempt a transaction or service from regulation upon finding that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

An exemption from the prior approval requirements of 49 U.S.C. 11323-25 is warranted under

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<sup>3</sup> MRL states that it reserves the right to submit additional filings with the Board if these amendments are not entered into within 90 days following BNSF's "reacquisition" of the line, and requests that the Board reserve jurisdiction to entertain any such filings. It is not necessary for the Board to specifically reserve jurisdiction, as petitions to reopen administratively final actions may be filed with the Board at any time. See 49 CFR 1115.4.

<sup>4</sup> Although LPC was granted an extension of time to file a reply, it did not file a reply by the June 2 due date.

the standards of 49 U.S.C. 10502. Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. An exemption from the application process will minimize the need for Federal regulatory control [49 U.S.C. 10101(2)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], reduce regulatory barriers to entry into and exit from the rail industry [49 U.S.C. 10101(7)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of this transaction is not needed to protect shippers from the abuse of market power. BNSF has stated that shippers will continue to have the same service options that they have now. Indeed, while receiving comments regarding future service, no shippers have actually opposed the transaction. Nevertheless, to ensure that shippers are informed, BNSF is required to serve all shippers using the line with a copy of this decision within 5 days after the service date of this decision and to certify to the Board that it has done so. Given the market power finding, it is not necessary to determine whether the transaction is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the employee protective conditions established in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), will be imposed.

The transaction is exempt from environmental reporting requirements under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, the above-described transaction is exempted from the prior approval requirements of 49 U.S.C. 11323-25, subject to the employee protective conditions in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).
2. BNSF shall serve a copy of this decision on all shippers that use the line within 5 days of the service of this decision and certify to the Board that it has done so.
3. This decision will be published in the Federal Register on June 26, 2003.
4. The exemption will become effective on July 23, 2003.

5. Petitions to stay must be filed by July 8, 2003. Petitions to reopen must be filed by July 18, 2003.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary