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January 12, 2005

VIA ELECTRONIC FILING

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

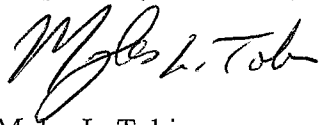
Re: **Finance Docket No. 34645**
The Burlington Northern and Santa Fe Railway Company --
Acquisition and Operation Exemption -- State of South Dakota

Dear Secretary Williams:

Attached for filing in the above-captioned proceeding please find a copy of the **Reply of State of South Dakota to Request for Waiver of The Burlington Northern and Santa Fe Railway Company**, dated January 12, 2005.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Myles L. Tobin
Attorney for State of South Dakota

MLT:tjl

Enclosures

cc: Adrian L. Steel, Jr., Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34645

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

**REPLY OF STATE OF SOUTH DAKOTA
TO REQUEST FOR WAIVER OF THE BURLINGTON
NORTHERN AND SANTA FE RAILWAY COMPANY**

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**ATTORNEYS FOR
STATE OF SOUTH DAKOTA**

Dated: January 12, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34645

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

**REPLY OF STATE OF SOUTH DAKOTA
TO REQUEST FOR WAIVER OF THE BURLINGTON
NORTHERN AND SANTA FE RAILWAY COMPANY**

On January 7, 2005, The Burlington Northern and Santa Fe Railway Company ("BNSF") filed a Supplemental Reply to Petition for Stay in this proceeding. Embedded in that filing is a belated request for waiver from the 35-day exemption procedures of 49 C.F.R. § 1150.35 and the 60-day labor notice provisions of 49 C.F.R. §§ 1150.32(e) and 1150.35(a), as they relate to the notice of exemption filed herein by BNSF on December 23, 2004. BNSF Supplemental Reply at 4, n.2. BNSF argues that these regulatory provisions are not applicable to its notice, and additionally that "no further purpose would be served by applying the sections at this point." Id.

The State of South Dakota (the "State") opposes "waiver" of the 35-day regulatory provisions of 49 C.F.R. § 1150.35, which precedent and BNSF's own prior actions demonstrate are plainly applicable to the transaction proposed by BNSF. The widespread advance public notice and additional review contemplated by those regulations is particularly important here, given the significant nature of the proposed acquisition and its potentially far-reaching implications for the structure and character of rail transportation in South Dakota. Indeed, this is precisely the type of transaction that the more thorough exemption procedures of

49 C.F.R. § 1150.35 were intended to address. The Board should require that BNSF file and serve the notice of intent required by 49 C.F.R. § 1150.35(b) and (c), and provide that BNSF's exemption would become effective no earlier than 35 days after filing the notice of intent (if not stayed further as requested in the State's pending petition for stay).

DISCUSSION

We note initially that BNSF's filings in this matter engender significant confusion as to what regulatory provision BNSF actually believes it is invoking. BNSF's Supplemental Reply and its December 29, 2004 letter reply argue that 49 C.F.R. § 1150.35 does not apply here because those procedures "are applicable only to transactions that involve the creation of Class I or Class II carriers." BNSF Letter Reply at 1. BNSF simultaneously argues that it does not have to provide the 60-day labor notice required by 49 C.F.R. § 1150.32(e) because Section 1150.32 is "applicable only to the creation of a Class III carrier [and] [t]here is no such transaction here." BNSF Letter Reply at 2. Those, of course, are the only two options for proceeding under the class exemption described in 49 C.F.R. § 1150.31 -- either pursuant to Sections 1150.32-.34, entitled "transactions that involve creation of Class III carriers," or pursuant to Section 1150.35, entitled "transactions that involve creation of Class I or Class II carriers." BNSF's apparent belief that it can create its own, third set of undefined regulatory requirements and declare that it is proceeding generically "under 49 C.F.R. § 1150.31" is puzzling.¹

¹ Referring to The Burlington Northern and Santa Fe Railway Company -- Acquisition and Operation Exemption -- Lac Qui Parle Regional Railroad Authority, Finance Docket No. 33364 (STB served April 15, 1997) ("BNSF/Lac Qui Parle"), BNSF in its Letter Reply stated that "BNSF [there] secured exemption authority under the seven-day procedure of Section 1150.31 it has used here." BNSF Letter Reply at 1-2. BNSF now concedes that it used the 35-day, rather than the seven-day, procedure, in BNSF/Lac Qui Parle. BNSF Supplemental Reply at 4, n.1. More pertinently here, however, there is no such thing as "the seven-day procedure of Section 1150.31." That section defines the overall scope of the class exemption. The seven-day procedure is provided for in Sections 1150.32-.34, just as the 35-day procedure is provided for in Section 1150.35.

This is not the kind of deficiency that should be addressed through a request for waiver. There seems to be no dispute here that 49 U.S.C. § 10901 and the class exemption procedures of 49 C.F.R. § 1150, Subpart D apply to an existing carrier's acquisition of abandoned lines (or active lines owned by a non-carrier) in the same manner that they apply to a non-carrier's acquisition of an active line. E.g., Simmons v. ICC, 829 F.2d 150 (D.C. Cir. 1987). There can be little dispute that the 35-day exemption procedures adopted in 1988 were meant to address "larger" transactions, and that the Interstate Commerce Commission used the Class III/Class II "demarcation line" (then \$17.7 million) as the revenue threshold that would define these "larger transactions" under the class exemption. Class Exemption -- Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 4 I.C.C.2d 309, 310 n.3, 311 (1988). There is no basis to conclude that those regulations apply differently to carrier and non-carrier invocation of the Section 10901 class exemption. Yet BNSF would have the Board find that Class I and Class II railroads can engage in any size transaction -- here, one involving rail lines with over \$80 million in annual revenue -- under the abbreviated seven-day procedures for "Class III sized" transactions.

In Buffalo & Pittsburgh Railroad, Inc. -- Operation Exemption -- Lucerne Branch in Pennsylvania, Finance Docket No. 31372 (ICC served December 22, 1988), an existing Class II rail carrier filed a notice of exemption under 49 C.F.R. §§ 1150.32-.34 to operate a formerly abandoned line. The Commission explained that:

B&P did not certify that projected revenues for the Lucerne Branch do not exceed those that would qualify it as a Class III carrier as required by 49 C.F.R. § 1150.33(h) [now Section 1150.33(g)]. However, it is obvious that they do not because the line to be operated was previously abandoned and generates no revenues.

B&P at 2, n.3. Given that B&P was already a Class II carrier, the only logical purpose of this passage is to indicate that the relevant inquiry is whether the revenues on the line to be acquired exceed the Class III/Class II threshold. We note that, as in B&P, BNSF's largely narrative notice of exemption provides no revenue certification as required by 49 C.F.R. § 1150.33(g). Here, however, it is unclear how BNSF could legitimately have complied with that requirement, and equally unclear how its notice of exemption can survive its failure to even attempt to do so.

The applicability of the 35-day procedures of 49 C.F.R. § 1150.35 to this transaction is of course no surprise to BNSF, which not only used those longer procedures for a prior, parallel transaction with the State² but also in the BNSF/Lac Qui Parle proceeding referenced by BNSF itself. And the importance of those procedures here is far more than technical. The State may have had minimal notice of BNSF's filing here,³ but shippers on the Core Lines and other interested parties have not. Cf. BNSF Supplemental Reply at 4 n.2 ("The notice purpose of [Section 1150.35] has, as can be seen by the State's active involvement here, been met"). The transaction proposed by BNSF involves nearly 370 miles of rail lines, significant traffic volumes and a large number of shippers. It will result in a permanent restructuring of long-standing rail transportation relationships and dynamics in South Dakota, and potentially eliminate important protections for South Dakota shippers and rail service that are built into the current ownership and operation of the Core Lines by terminating the State's management and oversight responsibility for those Lines. The State does not purport to speak here for each of those shippers, but believes that the implications for them of this transaction may be serious and far-reaching. This is precisely the type of situation that the longer and more

² Burlington Northern Railroad Company -- Acquisition and Operation Exemption -- South Dakota Railroad Authority, Finance Docket No. 32017 (ICC served April 2, 1992) ("BN/Terry Line").

³ Just under three weeks as of the date of this filing -- still much less than the 35 days required in 49 C.F.R. § 1150.35.

thorough procedures of Section 1150.35 were meant to address, and there is no basis for waiving those procedures here.

Getting this process right is even more important in light of recent actions by the state court in The Burlington Northern and Santa Fe Railway Company v. State of South Dakota, Case No. 04-470 (S.D. 6th Circuit), the pending litigation between BNSF and the State regarding BNSF's contractual option to purchase the Core Lines. The court declined to stay judicial proceedings pending the completion of STB proceedings and (as BNSF has indicated) has set a trial date for September. BNSF Supplemental Reply at 7, n.3. That does not mean, of course, that dispositive motions (such as a BNSF motion for summary judgment) might not be filed and decided long before then. Because BNSF has sought not declaratory relief but rather specific performance of its contractual option and a court order requiring the actual physical transfer of the Core Lines, there remains the possibility that court action could essentially negate the STB's admitted jurisdiction over the transaction.

This is, of course, one of the important bases for the State's pending petition to stay, but it also counsels against a "fix it later" approach to the deficiencies in BNSF's notice of exemption. In its filings before the state court, BNSF argued that it "merely ha[s] to file a notice of exemption in order to completely fulfill and terminate any administrative function of the STB over" the proposed transaction, and that the transaction was subject to special exemption procedures that involve "virtually automatic approval by the STB" BNSF claimed that "[s]even days after a notice of exemption is filed, virtually *any* proposed transaction (unless fraudulent on its face) is thus deemed approved . . . ," and continually referred to the "STB's limited role" and "its limited regulatory proceedings." BNSF concluded with the assertion that -- despite seeking to have the court physically compel the transfer of the Core Lines -- "[i]n sum,

the STB has absolutely no substantive role to play in this case." BNSF Opposition Brief, Case No. 04-470 (S.D. 6th Circuit), December 29, 2004, at 13-14, 17.

A Board order allowing immediate effectiveness for BNSF's current deficient notice of exemption will undoubtedly be used to argue or imply to the state court that the STB is "done" with its "perfunctory" tasks and that the court can proceed to order the sale of the Core Lines with no further consideration of the Board's jurisdiction. That is plainly undesirable before resolution of the significant issues that will be raised in the State's forthcoming petition for partial revocation,⁴ but at the very least it should not be allowed to occur before the letter and (more importantly) the spirit of the Board's regulations have been met and shippers and other interested parties have received the benefit of the important protections provided for in the 35-day procedures of 49 C.F.R. § 1150.35. The Board thus should deny BNSF's request for waiver, require BNSF to serve the notice of intent provided for in 49 C.F.R. §§ 1150.35(a) and (b), and provide that any class exemption will become effective after disposition of revocation proceedings, but in any event no earlier than 35 days after service of the notice of intent.

Finally, we note that the same footnote seeking "waiver" of the requirements of 49 C.F.R. § 1150.35 also seeks waiver of the 60-day labor notice provisions of 49 C.F.R. § 1150.32(e) (and presumably 49 C.F.R. § 1150.35(a) if the 35-day procedures are found to apply). BNSF Supplemental Reply at 4, n.2. The State does not have a direct substantive interest in such a waiver request, although it would not seem that a footnote in a reply to a petition for stay is a desired place to initially address that regulatory requirement.⁵

⁴ The State currently anticipates filing that petition on or about January 31, 2005.

⁵ We also admit to being thoroughly stumped by BNSF's argument, BNSF Letter Reply at 2, that no labor notice is required here because it was not required in the 1992 BN/Terry Line or 1997 BNSF/Lac Qui Parle proceedings -- both of which predated adoption of the labor notice requirement. Acq. of R. Lines Under 49 U.S.C. 10901 & 10902 -- Advance Notice, 2 S.T.B. 592 (1997).

WHEREFORE, the State respectfully requests that BNSF's request for waiver of the provisions of 49 C.F.R. § 1150.35 be denied, that BNSF's pending notice of exemption be made subject to the requirements of that regulatory provision, and that the effectiveness of BNSF's exemption be stayed pending completion of revocation proceedings.

Respectfully submitted,

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**ATTORNEYS FOR
STATE OF SOUTH DAKOTA**

Dated: January 12, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2005, a copy of the foregoing
**Reply of State of South Dakota to Request for Waiver of The Burlington Northern and
Santa Fe Railway Company** was served via electronic mail and first-class mail upon:

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