

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Linda S. Stein
202.429.8185
lstein@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

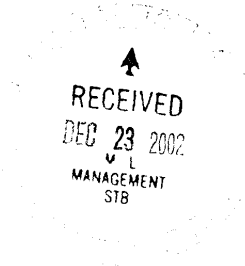
Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoel.com

December 23, 2002

Via HAND DELIVERY

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

206925



Re: **Finance Docket No. 34304, The Burlington Northern and Santa Fe
Railway Company -- Trackage Rights Exemption -- Portland &
Western Railroad, Inc. -- Bush, OR to Albany, OR**

Dear Secretary Williams:

Enclosed for filing in the above-referenced docket number are an original and ten (10) copies of The Burlington Northern and Santa Fe Railway Company's Motion to Dismiss.

An extra copy of the filing is enclosed for date-stamping and return to our office. If you have any questions relating to this filing, please call me at the above-reference telephone number. Thank you for your assistance.

Respectfully submitted,

Linda Stein

Linda S. Stein

Enclosures

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Office of Proceedings
DEC 23 2002
Part of
Public Record

WASHINGTON

PHOENIX

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LONDON

BRUSSELS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34304

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
— TRACKAGE RIGHTS EXEMPTION —
PORTLAND & WESTERN RAILROAD, INC. —
BUSH, OREGON TO ALBANY, OREGON**

**THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY'S
MOTION TO DISMISS**



**ENTERED
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DEC 23 2002
Part of
Public Record**

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby moves to dismiss this notice of exemption proceeding on the basis that separate approval by the Surface Transportation Board ("STB" or "Board") of the BNSF retained trackage rights at issue here is unnecessary. The retained trackage rights are part of the transaction involving the Portland & Western Railroad, Inc.'s ("P&WR") lease and operation of certain rail line owned by BNSF which is currently the subject of STB Finance Docket No. 34255. BNSF initiated this separate proceeding solely out of an abundance of caution to prevent any delay in the effective date of the exemption associated with the lease transaction in Finance Docket 34255. However, as explained below, because the trackage rights at issue in this docket are retained trackage rights under the lease transaction being considered in Finance Docket No. 34255, no separate Board approval is required. As a result, the Board should dismiss this proceeding.

BACKGROUND

BNSF and P&WR have entered into a lease agreement in which BNSF has agreed to lease certain trackage in Oregon to P&WR. As part of the transaction, BNSF retained overhead trackage rights over a portion of the Oregon track that it leased to P&WR in order to facilitate

interchange between BNSF and P&WR and other carriers. The terms of BNSF's retained trackage rights are set forth in a trackage rights agreement between BNSF and P&WR that is appended as Exhibit C to the lease agreement. Specifically, the trackage rights agreement provides that P&WR will grant overhead rights to BNSF over the leased Oregon rail line between Bush, Oregon (milepost 68.6) and Albany, Oregon (milepost 96.5).

In November, 2002 P&WR opened Finance Docket No. 34255 seeking to exempt its lease and operation of the Oregon rail line currently owned and operated by BNSF from regulation under 49 U.S.C. 10902. P&WR included the overhead trackage rights retained by BNSF over the Bush to Albany, Oregon portion of the leased rail line as part of the transaction under consideration in Finance Docket No. 34255.

In a decision served December 12, 2002, in Finance Docket No. 34255, the Board raised a question as to whether lessee P&WR's effort to grant trackage rights over a significant portion of the rail line back to the lessor, BNSF, are "incidental" to the transaction under consideration in that docket. The Board requested that the parties submit a separate filing to obtain authority for the trackage rights arrangement or demonstrate that separate filings are not necessary.

For the reasons set forth below, BNSF contends that its retained overhead trackage rights require no separate authority from the Board. Nevertheless, BNSF initiated this proceeding to prevent any delay in the effective date of the exemption for the lease at issue in Finance Docket 34255 while the Board determines whether separate Board approval is required for BNSF's retained trackage rights. In this motion to dismiss, BNSF demonstrates why no separate authority is necessary for BNSF's retained overhead trackage rights over a portion of the leased Oregon rail line and, accordingly, why the Board should dismiss this proceeding as unnecessary.

ARGUMENT

I. THE OVERHEAD TRACKAGE RIGHTS RETAINED BY BNSF DO NOT REQUIRE SEPARATE AUTHORITY FROM THE BOARD

BNSF's retained overhead trackage rights in a portion of the rail track leased to P&WR do not require separate authority by the Board. In an analogous case addressing the issue of retained overhead trackage rights, the Board rejected an argument made by the United Transportation Union-General Committee of Adjustments that BNSF attempted to improperly retain trackage rights through an exemption using 49 CFR 1150.31(a)(4) and should have been required to seek Board approval in a separate transaction.¹ The Board concluded that no separate authority for the retained trackage rights arrangement was necessary, explaining:

BNSF has simply transferred less than its entire interest in the line to [Minnesota Northern Railroad, Inc.] MNR, retaining certain overhead trackage rights for itself. BNSF has every right to do this. In this context we do not view the trackage rights retained by BNSF as incidental trackage rights under section 1150.31(a)(4). Finally, we find that there has been no transfer here of any trackage rights from MNR to BNSF, incidental or otherwise, that would require Board approval.

Id. at *12. Similarly, in this case, BNSF has retained overhead trackage rights in a certain portion of the trackage that it has leased to P&WR. Based upon the Board's reasoning in *Minnesota Northern Railroad*, this retention of overhead trackage rights does not even rise to the level of incidental trackage rights and there is no need for separate Board approval of the trackage rights arrangement.

¹ See *Minnesota Northern Railroad, Inc. -- Exemption -- Acquisition and Operation of Rail Line and Incidental Trackage Rights from Burlington Northern Railroad Company; RailAmerica, Inc.--Continuance in Control Exemption--Minnesota Northern Railroad, Inc; Minnesota Northern Railroad, Inc--Trackage Rights--The Burlington Northern and Santa Fe Railway Company*, Finance Docket Nos. 33315, 33316, 33337, 1997 STB Lexis 194 (served Aug. 14, 1997).

Even if the retained trackage rights arrangement were analyzed under the incidental trackage rights standard of 49 CFR 1150.41(d), there is no need for separate approval of this arrangement since the overhead trackage rights that BNSF is seeking to retain are truly incidental to the lease transaction itself. In Finance Docket No. 34255, P&WR is seeking to exempt from regulation under 49 U.S.C. 10902 its lease and operation of certain rail line in Oregon currently owned and operated by BNSF. The regulation at 49 CFR 1150.41(d) provides that an exemption under section 10902 includes the "acquisition of incidental trackage rights." The regulation provides that

Incidental trackage rights include the grant of trackage rights by the seller or the acquisition of trackage rights to operate over the line of a third party, that occurs at the time of purchase.²

Under circumstances virtually identical to those at issue in this case, the Board's predecessor, the Interstate Commerce Commission ("ICC"), found that a purchaser's grant of trackage rights back to a subsidiary of the seller of the line was incidental to the sale transaction and, thus, did not require separate approval under 49 U.S.C. 11343. *See Alabama Southern Railroad Company, Inc. and The Alabama Great Southern Railroad Company -- Acquisition, Operation and Trackage Rights -- Exemption*, 1 I.C.C. 2d 298 (1984). In this proceeding, the Alabama Southern Railroad Company ("ASR") purchased 10 miles of railroad from Southern Railroad Company whose subsidiary, Alabama Great Southern Company ("AGS"), had been leasing the track. ASR then granted back to AGS trackage rights on a portion of the rail line purchased by ASR. *Id.* The ICC found that this trackage rights agreement was "*de minimus* and

² "Incidental trackage rights" are defined similarly for exempt transactions under 49 U.S.C. 10902 (49 CFR 1150.41(d)), like the P&WR transaction at issue in Finance Docket No. 34255, and exempt transactions under 49 U.S.C. 10901 (49 CFR 1150.31(d)), like the transaction at issue in the *Minnesota Northern Railroad* case.

... entirely incidental to the section 10901 acquisition. Therefore, [it] does not require separate approval under section 11343.” *Id.* at 299. See also *Parksierra Corporation (Successor-in-Interest to California Northern Railroad Company Limited Partnership) - Lease and Operation Exemption - Southern Pacific Transportation Company; Parksierra Corporation (Successor-in-Interest to California Northern Railroad Company Limited Partnership) - Trackage Rights Exemption - North Coast Railroad Authority*, STB Finance Docket Nos. 34126 & 34127, 2001 STB Lexis 961 at *5, 16 (served Dec. 26, 2001) (Board refers to purchaser’s grant back to seller of trackage rights in a portion of the purchased line as “incidental trackage rights”); *Chicago, Missouri & Western Railway Company -Trackage Rights - Chicago South Shore and South Bend Railroad*, STB Finance Docket No. 31038, 1987 ICC Lexis 63 at *6 (served Nov. 13, 1987) (“Our rules, however, do not preclude as part of an exempt transaction a grant of trackage rights by one other than the seller of the line in the underlying transaction. Where the grant is otherwise incidental to that transaction.” [Citation omitted.]

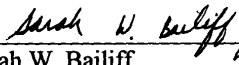
While the Director of Proceedings reached a different conclusion in *Portland & Western Railroad, Inc. -- Lease and Operation Exemption -- Port of Tillamook Bay Railroad*, Finance Docket No. 33734, 1999 STB Lexis 270 (served May 10, 1999), that decision does not warrant a finding that separate approval of BNSF’s retained overhead trackage rights is necessary here. In the *Portland & Western Railroad* decision, the Director of Proceedings stated that the grant of trackage rights by the lessee back to the lessor is not “incidental” to the lease transaction because incidental tracking rights are “simultaneous rights being obtained by a lessee to operate over the other lines of a lessor or lines of another carrier” and, thus, would require separate approval for trackage rights. *Id.* at 1.

However, this decision is inconsistent with the Board and ICC precedent discussed above, and appears to be based on the erroneous assumption that "incidental" trackage rights can only arise in the two situations specified in 49 CFR 1150.41(d). However, the regulation does not indicate that the two specified situations are the only ones in which incidental trackage rights can occur; it simply provides that incidental trackage rights "include" those situations. Further, is it illogical to limit "incidental" trackage rights to the two situations specified in the regulation since there are other circumstances in which the grant of trackage rights is clearly "incidental" to the transaction. For example, a lessee's agreement to grant overhead trackage rights back to the lessor over a portion of the leased rail line to facilitate interchange (the situation here) is certainly more *de minimus* and incidental to the lease transaction than a third-party's agreement to grant trackage rights over non-leased rail lines to the lessee, a situation clearly defined as "incidental" in the regulation. In any event, the Board does not have to reach this issue if it concludes, consistent with the decision in *Minnesota Northern Railroad*, that BNSF's retained overhead trackage rights in the Oregon rail line do not even rise to the level of incidental trackage rights, and, thus, do not require separate Board authority.

CONCLUSION

For the reasons set forth above, a separate proceeding seeking exemption from regulation for BNSF's retained overhead trackage rights in a portion of the leased Oregon rail lines is unnecessary. If the Board concludes that separate Board approval of the retained trackage rights is not required, BNSF requests that the Board dismiss this proceeding as unnecessary.

Respectfully Submitted,



Sarah W. Bailiff
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive
P.O. Box 961039
Fort Worth, Texas 76131-2830
(817) 352-2354 - Telephone
(817) 352-2397 - Facsimile
**Counsel for The Burlington Northern and
Santa Fe Railway Company**