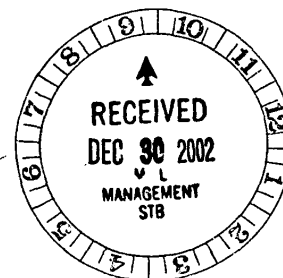


ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



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Finance Docket No. 34304

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY-TRACKAGE
RIGHTS EXEMPTION-THE PORTLAND & WESTERN RAILROAD, INC.

REPLY TO MOTION TO DISMISS

ENTERED
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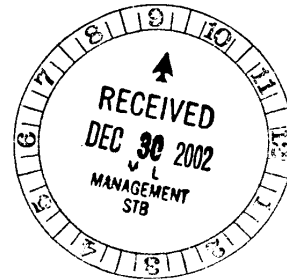
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December 30, 2002

Attorney for John D. Fitzgerald

Before the
SURFACE TRANSPORTATION BOARD



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REPLY TO MOTION TO DISMISS

Preliminary Statement

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment UTU/GO-386), submits this reply to the motion by The Burlington Northern and Santa Fe Railway Company (BNSF), filed December 23, 2002, whereby BNSF seeks to dismiss its earlier notice of exemption (Notice), filed December 20, 2002, pursuant to the trackage rights class exemption, 49 CFR § 1180.2(d)(7).^{2/}

The BNSF trackage rights Notice is for BNSF to operate over the line of Portland & Western Railroad, Inc. (PNWR) between Bush (Salem) and Albany, OR, a distance of approximately 27.9 miles.

The Notice states the trackage rights are for the purpose of moving trains over the PNWR line containing loaded or empty cars

^{1/} General Chairman for United Transportation Union (UTU), on lines of The Burlington Northern and Santa Fe Railway Company (BNSF), with offices at 400 East Evergreen Blvd., Vancouver, WA 98660.

^{2/} See: Railroad Consolidation Procedures, 1 I.C.C.2d 270 (1985), rev. den. Illinois Commerce Com'n v. ICC, 819 F.2d 311 (D.C. Cir. 1987).

for interchang with PNWR and other carriers at Albany, OR,^{3/} or for pre-positioning or storage of cars as agreed to between BNSF and PNWR. (Notice 3). The exemption set forth in the Notice became effective 7-days after filing on December 20, 2002, which would be on December 27, 2002; however, the agreement between PNWR and BNSF (Notice Ex. 2) specifies that the transaction does not become effective until January 1, 2003.

The BNSF Notice states the trackage rights are filed as part of a lease agreement (§9(a) and Exhibit C), dated October 24, 2002, which is the subject of Finance Docket No. 34255, Portland & Western Railroad, Inc.-Lease and Operation Exemption-The Burlington Northern and Santa Fe Railway Company, involving BNSF's lease to PNWR of BNSF's 76.75-mile line between Quinaby-Salem-Albany-Eugene. (Notice 2-3).^{4/} The 27.9-mile Bush/Albany segment is within the 76.75-mile line.

Background

BNSF in its Notice contends that the 27.9-mile trackage rights over PNWR between Bush/Salem and Albany should not require a Notice of Exemption, arguing that BNSF's so-called "reservation" of trackage rights in the lease agreement (Finance Docket No. 34255) results in the transfer of less than its entire interest in

^{3/} Freight carriers serving Albany are BNSF, PNWR, Albany & Eastern Railroad Company (AERC), and Union Pacific Railroad Company (UP). Hladick, Official Railroad Station List OPRL 6000-W at 370, 642, 659, 795, 837. Amtrak also serves Albany. (ibid. at 643).

^{4/} Although the Notice describes the lease in Finance Docket No. 34255 as extending between Salem and Eugene (Notice 2), in actual fact the lease extends from Quinaby, situated some 3.9 miles north of Salem. See: Decision, 12/26/02, 1).

the line to PNWR, for which no Board approval is required, citing Finance Docket No. 33315, et. al., Minnesota Northern Railroad, Inc.-Exemption-Acquisition and Operation Exemption and Incidental Trackage Rights From Burlington Northern Railroad Company(not printed) (served August 14, 1997) (Minnesota Northern).

BNSF on December 23, 2002, followed with its formal motion to dismiss the Notice, contending that the BNSF trackage rights are "reserved" or "retained" trackage rights, which BNSF argues do not require separate Board authority, again relying solely upon Minnesota Northern, supra. (BNSF Motion, 12/23/02, 3).

However, in addition to its "retained trackage rights" theory, BNSF argues that such "retained" trackage rights also become excepted from Board approval as "incidental" to the lease agreement itself, citing Alabama Southern R. Co. Inc., Et Al-Exemption, 1 I.C.C.2d 298 (1984), Finance Docket No. 34126, et al., ParkSierra Corporation (Successor-in-Interest to California Northern Railroad Company Limited Partnership)-Lease and Operation Exemption-Southern Pacific Transportation Company(not printed) (served December 26, 2001) (ParkSierra), and Finance Docket No. 31038, Chicago, Missouri & Western Railway Company-Trackage rights-Chicago South Shore and South Bend Railroad(not printed) (served December 3, 1987). (South Shore). BNSF recognizes decision-noticees in the involved area which are contrary to its position. Finance Docket No. 33734, Portland & Western Railroad, Inc.-Lease and Operation Exemption-Port of Tillamook Bay Railroad, 64 Fed. Reg. 26478 (May 14, 1999) (Portland & Western); Finance Docket No. 33741, Port of Tillamook Bay Railroad-Trackage Rights Exemption-

Portland & Western Railroad, Inc., 64 Fed. Reg., 26478 (May 14, 1999). (Tillamook Bay). (BNSF Motion, 12/23/02, 4-5).

Finally, BNSF argues that "incidental" trackage rights can arise under 49 CFR § 1150.41(d), and thus not require Board approval, in situations other than those specified in § 1150.41(-d), because the term "include" is found in § 1150.41(d). BNSF urges such a situation exists where a "grant back" of trackage rights is to facilitate interchange between carriers. (BNSF Motion, 12/13/02, 6).

ARGUMENT

The Board should deny BNSF's motion to dismiss. The initial view of the Chairman that the BNSF trackage rights constitute a "grant back" of trackage rights, requiring a separate filing, is correct. Moreover, we note that State of Oregon concurs with this view.^{5/}

I. THE PNWR-BNSF LEASE AGREEMENT DOES NOT "RESERVE" OR "RETAIN" BNSF TRACKAGE RIGHTS; RATHER, PNWR "GRANTS" OR "GRANTS BACK" TRACKAGE RIGHTS FOR BNSF.

BNSF has contrived a theory that the PNWR-BNSF lease agreement in Finance Docket No. 34255 is one where BNSF "reserved" or "retained" trackage rights. The term "reserved" or "reservation" appears twice in the Notice,^{6/} and the term "retain" appears twice.^{7/} In BNSF's motion to dismiss, the term "retain" or "retained" appears throughout, on virtually every page. BNSF Motion,

^{5/} State of Oregon, Comments 8, filed December 23, 2002.

^{6/} Notice, p. 2.

^{7/} Notice pp. 2, 5.

12/23/02, p. 1 (four times), p. 2 (five times), p. 3 (six times), p. 4 (two times), p. 5 (one time), and p. 6 (three times).

The difference between a retention of trackage rights, and a grant of trackage rights, is important for a lease transaction. Parties can structure a transaction in many ways. A retention of trackage rights in the lease does not require agency approval or exemption; however, a grant or grant back of trackage rights does require approval or exemption. The Board in Minnesota Northern, supra, at 4, set forth the important distinction between "retention," on the one hand, and "grant, on the other hand."^{8/}

UTU-GCA also argues that BNSF improperly retained trackage rights here through an exemption in violation of 49 CFR 1150.31(a)(4). According to UTU-GCA, BNSF should instead have been required to convey the entire line to MNR, including all operations, and then MNR should have been required to seek Board approval in a separate transaction to grant trackage rights back to BNSF. We see nothing improper in the parties' approach here. The parties could have structured their agreement in the manner suggested by UTU-GCA but chose not to do so. BNSF has simply transferred less than its entire interest in the line to MNR, retaining certain overhead trackage rights for itself. BNSF had 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).

It is clear that the PNWR-BNSF lease is a complete transfer of operating authority to PNWR, with a grant of trackage rights back to BNSF. Nothing was retained by BNSF except ownership of the property itself if, indeed, BNSF holds title. Section 9(a) and Exhibit C to the PNWR-BNSF lease in Finance Docket No. 34255 clearly indicate an affirmative grant by PNWR to BNSF. Thus,

^{8/} The full text of Minnesota Northern is included in UTU/GO-386's Petition For Stay of Exemptions, 12/23/02, Ex. 6).

Minnesota Northern is consistent with a finding that a grant of trackage rights is involved, and requires Board approval.

It should be noted that the PNWR filings in Finance Docket No. 34255 always refer to the BNSF trackage rights as stemming from a grant by PNWR, without any claim for BNSF retention of such rights in the agreement. See: Finance Docket No. 34255, Notice of Intent, 11/21/02, 1 n.1; Notice of Exemption, 12/6/02, 1-2, Exhibit C.

The belated attempt by BNSF to now characterize the PNWR-BNSF lease agreement as one for the reservation or retention of track-age rights is bogus.

II. THERE IS NO AGENCY DETERMINATION "GRANT BACK"
TRackage RIGHTS ARE EXCEPTED FROM REGULATION IF
THEY ARE "INCIDENTAL" TO A LEASE TRANSACTION.

There is no merit to BNSF's argument that the BNSF trackage rights are excepted from prior approval if they are a grant back of "incidental" trackage rights in a lease transaction. (BNSF Motion, 12/23/02, 4-5). The three citations advanced by BNSF are simply not in point.

Incidental trackage rights first arose in the context of line sales to a non-carrier, where the seller accorded trackage rights to the non-carrier, usually enabling the newly to-be-created carrier to reach a junction point off the trackage to be acquired. Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 109801, 1 I.C.C.2d 810, 816 (1985).

The cases on "incidental" trackage rights involved a non-carrier acquiring the line segment of a carrier together with associated trackage rights, and came under the single-carrier

provisions of 49 U.S.C. 10901. Thus, in Alabama Southern R. Co. Inc., Et Al-Exemption, supra at 299-300, a non-carrier acquired different segments of a line from a carrier, with 3,000 feet of de minimis trackage rights; but since only one carrier was involved, the trackage rights were incidental to the § 10901 transaction. This citation is of no assistance for BNSF's motion to dismiss.

In ParkSierra, supra, the Board found a return grant of "incidental" trackage rights in a lease transaction to come under 49 U.S.C. 11323-26, with the imposition of employee conditions. ParkSierra, supra 8. This citation, similar to Minnesota Northern, provides no assistance for BNSF's motion--indeed it has the opposite effect.

In South Shore, the former ICC ruled that a non-carrier acquiring incidental trackage rights over a rail carrier is subject to 49 U.S.C. 10901 instead of 49 U.S.C. 11323. South Shore, supra at 4. Again, this single-carrier transaction is on no help to BNSF.

The Board's decisions in Portland & Western and Tillamook Bay) are directly in point against BNSF; moreover, these decisions should have served as a warning to PNWR for the instant proceeding.

III. THE BNSF TRACKAGE RIGHTS IS NOT NECESSARY FOR INTERCHANGE TRAFFIC.

Finally, BNSF belatedly argues that incidental trackage should arise in situations other than the two set forth in 49 CFR §1150.41(d) as, for example, a grant back of trackage rights to facilitate interchange. (BNSF Motion, 12/23/20, 6).