

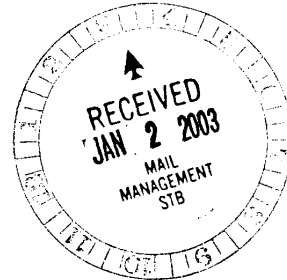
Mac A. Fleming
President



William E. LaRue
Secretary-Treasurer

Brotherhood of Maintenance of Way Employees
Affiliated with the A.F.L.-C.I.O. and C.L.C.

January 2, 2003



by messenger

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

206983

ENTERED
Office of Proceedings

JAN 02 2003

Part of
Public Record

Re: Finance Docket No. 34304

Dear Secretary Williams:

Enclosed for filing in the above referenced proceeding are the original and ten copies of the Reply of the Brotherhood of Maintenance of Way Employees to the motion to dismiss filed by The Burlington Northern Santa Fe Railway Company. Also enclosed is a diskette containing the Reply, minus its Exhibit, in WordPerfect 9 format.

An extra copy of the filing is enclosed for date-stamping and return to the undersigned. Please contact me if you have any questions regarding this filing.

Respectfully submitted,

Donald F. Griffin
Director Strategic Coordination and Research
Brotherhood of Maintenance of Way Employees

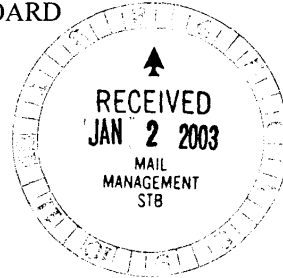
enclosures

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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

REPLY OF THE BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES IN OPPOSITION TO THE MOTION TO DISMISS FILED
BY THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

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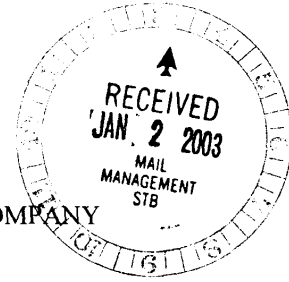
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Counsel for the Brotherhood of Maintenance of
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Dated: January 2, 2003

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34304



THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
– TRACKAGE RIGHTS EXEMPTION –
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REPLY OF THE BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES IN OPPOSITION TO THE MOTION TO DISMISS FILED
BY THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

The Brotherhood of Maintenance of Way Employees (“BMWE”) respectfully submits this reply in opposition to the motion filed by The Burlington Northern and Santa Fe Railway Company (“BNSF”) to dismiss its recently filed notice of exemption. BNSF contends that the trackage rights it will hold over the Portland & Western Railroad, Inc. (“P&WR”) following BNSF’s lease of trackage to P&WR are either “retained” trackage rights for which no Board approval is needed, or, alternatively, the trackage rights are “incidental” to the lease transaction as that term is used in 49 C.F.R. §1150.41. Neither a careful reading of the trackage rights agreement appended by BNSF to its notice of exemption nor the definition of “incidental trackage rights” in 49 C.F.R. §1150.41 supports BNSF’s motion. Accordingly, BMWE submits the Board must reject BNSF’s motion to dismiss.

On November 21, 2002, the P&WR filed a notice of its intent to file a verified notice of exemption pursuant to 49 C.F.R. §1150.41 to exempt its lease of approximately 76.75 miles of track owned by the BNSF. In that notice, the P&WR also stated that it intended to grant “incidental trackage rights” to BNSF to operate over the leased line between Bush and Albany,

Oregon.¹ On December 12, 2002, the Chairman served a decision in that related proceeding, Finance Docket No. 34255, Portland & Western Railroad, Inc.-Lease & Operation Exemption-The Burlington Northern and Santa Fe Railway Company, granting the motion of the United Transportation Union General Committee of Adjustment GO-386 ("UTU/GO-386") to compel the P&WR to furnish a copy of its lease agreement with BNSF. The Chairman also denied UTU/GO-386's petition for stay on the grounds that the exemption could not become effective any earlier than December 27, 2002 "contrary to any statements P&WR may have made in its filings." December 12th Decision at 2. Additionally, the Chairman noted that "a serious question exists as to whether the trackage rights are incidental to the transaction as asserted by P&WR." Id. The Chairman restated the Board's definition of "incidental trackage rights" and initially determined that the trackage rights in this case did not meet that definition. He concluded his order stating "[i]f the parties seek to enter into these trackage rights arrangements, they should submit separate filing to obtain authority or demonstrate why separate filings are not necessary." Id. On December 20, 2002, BNSF filed the verified notice of exemption in this docket and followed that filing with its motion to dismiss on December 23, 2002.

ARGUMENT

I. BNSF Did Not "Retain" The Trackage Rights At Issue Here In Its Lease With P&WR

BNSF's initial argument that it has "retained" the trackage rights at issue here as part of the lease is undone both by the P&WR's characterization of the trackage rights and the language of the trackage rights agreement submitted by BNSF with its verified notice of exemption. The

¹On December 6, 2002, the P&WR filed a verified notice of exemption that it would grant BNSF and the Central Oregon & Pacific Railroad, Inc. "incidental trackage rights" to "preserve interchange arrangements among carriers."

P&WR's verified notice of exemption clearly states that it "will grant BNSF . . . incidental trackage rights to preserve interchange arrangements among carriers." Notice of Exemption at 1 (emphasis added). A party cannot "grant" that which it does not have, clearly P&WR's leasehold interest is complete and effects a total transfer of operating rights over the line from BNSF to P&WR. The only way BNSF can operate over the line subsequent to the lease is through a subsequent grant back of trackage rights by P&WR.² This inference regarding the terms of the lease is supported by the trackage rights agreement between BNSF and P&WR appended to the verified notice in this case. Indeed, the fact that such a separate agreement exists at all demonstrates that BNSF "retained" nothing in the lease transaction, because if that was so, the lease itself would have governed the terms of P&WR's leasehold interest in the line. The fact that BNSF and P&WR had to execute a subsequent trackage rights agreement wherein P&WR granted permission to BNSF for continued access to the line clearly shows that BNSF retained nothing in the original lease.

A review of the trackage rights agreement shows that P&WR is called the "Lessee" and BNSF is the "User."³ Section 1.2 of the agreement states that "Lessee grants User the nonexclusive right to use the Joint Trackage for the limited operation of its trains, locomotives, cabooses and cars with its own employees and equipment in its account over the Joint Trackage in common with Lessee." The Section further sets restrictions on BNSF's operations under the

²BMWE can only infer the contents of the lease because the entire document has been classified as "Highly Confidential" by P&WR. Although counsel for BMWE executed an undertaking pursuant to the Board's protective order, counsel only can view "Confidential" materials because he is an employee of the BMWE. See, Letter dated December 27, 2002 from P&WR's counsel to the undersigned attached as Exhibit 1.

³The trackage rights agreement is Exhibit No. 2 to BNSF's verified notice of exemption.

grant of trackage rights. Clearly, the trackage rights agreement is structured so that P&WR is the grantor of the trackage rights and BNSF is the grantee. BNSF retained no rights to continued operation under the lease, therefore BNSF's claim that its continued operation over the line is not subject to Board approval or jurisdiction is flat wrong.

BNSF's citation to STB Finance Docket No. 33315, Minnesota Northern R.R. – Exemption – Acquisition & Operation of Rail Line & Incidental Trackage Rights from Burlington Northern R.R., served August 14, 1997 is unavailing. In Minnesota Northern, the union contended that the Burlington Northern was required to transfer its entire operating authority to Minnesota Northern in the lease and then receive a grant back of trackage rights from the lessee in a separate proceeding. The Board rejected that argument thus (slip op. at 6):

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.

Unfortunately for BNSF here, it did not do what it did in Minnesota Northern. The trackage rights agreement attached to the verified notice of exemption clearly states that P&WR grants "nonexclusive" trackage rights to BNSF under the conditions set forth in the agreement. BNSF did not structure the lease to retain any operating rights, consequently Minnesota Northern is inapposite to this proceeding.

II. The Trackage Rights Granted By P&WR To BNSF Are Not "Incidental" As That Term Is Defined In 49 C.F.R. §1150.41

The Board has jurisdiction pursuant to 49 U.S.C. §11323(a)(6) of any attempt by a rail carrier such as BNSF to obtain trackage rights over another carrier, such as P&WR. In this proceeding, BNSF has invoked a class exemption under 49 C.F.R. §1180.2(d)(7) to bypass Board review and approval of the trackage rights between it and P&WR. BNSF attempts to defeat the Board's jurisdiction under Section 11323(a)(6) and the class exemption in 49 C.F.R. §1180.2(d)(7), by contending that the trackage rights are "incidental" to the BNSF/P&WR lease transaction as that term is defined in 49 C.F.R. §1150.41. The term "incidental trackage rights" are defined in that section to "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 the purchase." On its face, the trackage rights grant by P&WR to BNSF does not fit the definition and BNSF concedes as much. Motion to Dismiss at 6. This is so because P&WR is not the "seller" in the lease transaction in Finance Docket No. 34255. Indeed, there is no "seller" in that transaction anyway because the transaction between P&WR and BNSF is a lease and the two carriers are, respectively, lessee and lessor. Also, the trackage rights are not granted to operate over the line of a third party, instead BNSF will obtain rights to operate over the line it leased to P&WR.

The Director of Proceedings reached a similar interpretation of 49 C.F.R. §1150.41 in a case that involved P&WR, STB Finance Docket No. 33734, Portland & Western Railroad, Inc.—Lease & Operation Exemption—Port of Tillamook Bay Railroad, served May 14, 1999 (not published). In that decision, the Director hewed to the plain language of 49 C.F.R. §1150.41 and correctly construed the definition of "incidental trackage rights" narrowly as applying only to the

two situations enumerated in the regulation. BNSF rejects the Tillamook Bay decision and asserts the putative error of the Director of Proceedings, “appears to be based on the erroneous assumption that ‘incidental’ trackage rights can only arise in the two situations specified [in the section].” Motion to Dismiss at 6. The Director of Proceedings’ decision in Tillamook Bay was not “erroneous” as BNSF contends. Instead, the Director correctly applied the doctrine of expressio unius est exclusio alterius to note that the two situations enumerated under that section can be characterized as incidental trackage rights and no others. Instead, BNSF argues that the Board can somehow apply some standardless test to determine if trackage rights that do not fit the regulatory definition nevertheless are “incidental” regardless of who grants them. The approach suggested by BNSF is the definition of arbitrary and capricious agency action because it is standardless and is directly at odds with the statutory mandate in Section 11323(a)(6) that the Board must exercise jurisdiction over trackage rights arrangements between rail carriers. The Board has created, by regulation, a limited exception to that jurisdiction in 49 C.F.R. §1150.41; however that exception does not apply here by its clear terms.

BNSF cites three decisions of the Board or the Interstate Commerce Commission (“ICC”) that allegedly support its criticism of the Tillamook Bay decision. All three are distinguishable and actually illustrate how misguided BNSF’s arguments are here.

ICC Finance Docket No. 31038, Chicago, Missouri & Western Ry. – Trackage Rights – Chicago South Shore & South Bend R.R., November 13, 1987 (1987 ICC LEXIS 63) does not address the definition of “incidental trackage rights” contained in 49 C.F.R. §1150.41. In a related transaction to that case, the Chicago, Missouri & Western (“CMW”), a noncarrier, acquired rail lines and trackage rights from the Illinois Central Gulf (“ICG”). 1987 ICC LEXIS

63 at *2. The instant transaction involved a grant of trackage rights by South Shore which held a “perpetual” leasehold interest in lines owned by the ICG. Id. The ICC rejected the argument that “incidental trackage rights” could only be granted by the seller of a line to a noncarrier and held that a noncarrier could obtain trackage rights from a third party that were “incidental” to the primary transaction. Id. at *10. The ICC’s entire discussion of whether the trackage rights granted by South Shore were “incidental” pertained to the issue of whether or not the proceeding between CMW and South Shore could properly be classified as subject to former Section 10901 of the Interstate Commerce Act as opposed to former Section 11343 which governed carrier-to-carrier transactions. Significantly, the ICC did not dismiss the proceeding because the trackage rights were “incidental” to the the CMW-Illinois Central Gulf transaction, it merely held that employee protective conditions were not required nor warranted under its interpretation of CMW’s status as a noncarrier at the time of the trackage rights agreement. Id. at *10-13. Here, there is no dispute that BNSF and P&WR are carriers, so that their trackage rights arrangement falls under Section 11323.

Similarly, the decision in STB Finance Docket No. 34127, ParkSierra Corp.– Trackage Rights Exemption – North Coast Ry. Authority, served December 26, 2001 (not published) is inapposite. In 1996, ParkSierra’s predecessor assigned its leasehold interest in the line to the North Coast Railway Authority (“NCRA”) and, in the Board’s words “was granted incidental trackage rights in return” from NCRA. Slip op. at 6. The trackage rights agreement was omitted from the original notice of exemption and was not discovered until another entity sought to purchase ParkSierra. Id. In ParkSierra, the Board simply retroactively exempted the trackage rights arrangement between ParkSierra and NCRA and imposed the standard employee

protective conditions. Id. at 6-7. Significantly, while the Board may have used the term “incidental” to describe the trackage rights arrangement in the original leasehold, it did not rule the trackage rights were incidental to the lease transaction as that term is defined in 49 C.F.R. §1150.41 and thereby contemplated by the exempt transaction between ParkSierra’s predecessor and NCRA. Instead, the Board held that ParkSierra and NCRA were required to seek separate authorization for the grant back of trackage rights from NCRA to ParkSierra which is exactly the transaction presented here between P&WR and BNSF.

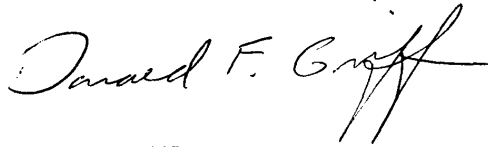
Finally, BNSF’s reliance on Alabama Southern R.R. – Acquisitions, Operations & Trackage Rights – Exemption, 1 I.C.C.2d 298, 1984 ICC LEXIS 339 is misplaced. First, that decision predates the ICC’s promulgation of the term “incidental trackage rights” in 49 C.F.R. §1150.31 by two years and the STB’s adoption of that term in 49 C.F.R. §1150.41 by twelve years. In 1986, the ICC defined the term “incidental trackage rights” in its regulations and BNSF has cited to no case since that date that gives the expansive reading to the terms that BNSF seeks here. Whatever Alabama Southern may stand for, it cannot be used to impeach the ICC’s and Board’s subsequent adoption of a clear definition of what qualifies for classification as “incidental trackage rights” in an exempt transaction. Second, the grant of trackage rights in that case by Alabama Southern back to a subsidiary of the seller was characterized as “de minimus” by the ICC. 1984 ICC LEXIS 339 at *4. The trackage rights grant was to 3000 feet of track “for the purpose of turning engines and cars moving on AGS’ intersecting rail line.” Id. at *2. In contrast, the trackage rights granted by P&WR cover 27.9 miles of track and BNSF can use the trackage rights for the “purpose of moving trains over the Joint Trackage containing loaded or empty cars interchanged with P&W and other carriers having interchanges at Albany, or for pre-

positioning or storage of cars as agreed to between BNSF and P&W." Trackage Rights Agreement Section 1.1. In other words, the trackage rights here contemplate revenue movements by BNSF, not the simple turning of cars and engines contemplated by the trackage rights in Alabama Southern. Alabama Southern does not support BNSF's claim that the trackage rights agreement is "incidental" to the lease transaction.

CONCLUSION

Based upon the foregoing, and upon consideration of the separate reply filed by UTU/GO 386, the BMWWE respectfully submits the Board must reject BNSF's motion to dismiss the verified notice of exemption.

Respectfully submitted,

A handwritten signature in cursive script, reading "Donald F. Griffin". The signature is written in dark ink and is positioned above the printed name and title.

Donald F. Griffin
Director of Strategic Coordination and Research
Brotherhood of Maintenance of Way Employees
10 G Street, N.E., Suite 460
Washington, D.C. 20036
(202) 638-2135

Counsel for the Brotherhood of Maintenance of
Way Employees

Dated: January 2, 2003

Certificate of Service

I hereby certify that today a copy of the foregoing Reply In Opposition was served on the following parties:

By hand:

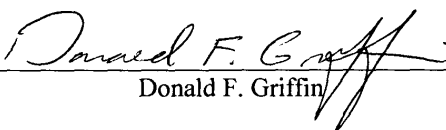
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Donald F. Griffin

Dated: January 2, 2003

Exhibit 1

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December 27, 2002

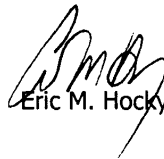
Donald F. Griffin
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RE: STB Finance Docket No. 34225 (Portland & Western)

Dear Mr. Griffin:

I am in receipt of your signed "confidential" undertaking and request for a copy of the PNWR lease. Please be advised that the lease agreement in this proceeding has been designated as "highly confidential" and is therefore available only to outside counsel and consultants. Please let me know if you have any questions.

Very truly yours,


Eric M. Hocky

EMH/e

GOLLATZ GRIFFIN & EWING, P.C.

WEST CHESTER

PHILADELPHIA

WILMINGTON