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Mr. Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20423

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January 27, 2003

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EXPEDITED HANDLING REQUESTED

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

Dear Mr. Williams:

The captioned proceeding has been noticed by the Board for its
open voting conference, scheduled for Thursday, January 30. 68 Fed.
Reg. 3930-31. (Jan. 27, 2003).

Today's notice was preceded by a Staff "News" release, dated
Thursday, January 23, purporting to not only list the motion up for
decision by the Board, but also to define the term "trackage rights"
as embracing or requiring a "rental fee:"

"At issue is a notice of exemption concerning trackage
rights (the use of a railroad's track, for a rental fee,
by another railroad)."

The involved BNSF-PNWR trackage rights agreement does not
provide for compensation, and the matter of a facially "free" track-
age rights was not raised by any of the parties, which include not
only BNSF and PNWR, but also State of Oregon, Brotherhood of Mainte-
nance of Way Employees, and United Transportation Union-GO/386 (J.D.
Fitzgerald).

The Staff definition of trackage rights is incorrect. In this
unusual situation, I ask that this letter be received as a response
to the Staff definition and/or that the proceeding be dropped from
the conference list and reopened for additional pleadings addressed
to this matter.

It is common that trackage rights do not directly carry a
rental fee, particularly if the rights are associated with other
consideration in other undertakings. Indeed, such a facially "free"
trackage rights are involved in Finance Docket No. 34114, also
noticed for the voting conference.

Ordinarily, a railroad may allow another to use a portion of its line on such terms and conditions as it deems proper. 74 C.J.S. (Railroads), Section 262 (2002 Ed.). There is no requirement for any compensation.

One reference, Hawkins Digest (Mayo, MD), lists a year 1931 definition of trackage rights as "the right of one carrier to use the tracks of another for a compensation usually varying with the extent of the use." Louisiana, A. & T. Ry. Co. Operation, 170 I.C.C. 602, 606 (1931), which was taken from an earlier case. Texas Midland Railroad, 75 I.C.C. 1, 123 (1918).

This definition arose in the context of the former ICC's administration of the 1913 Valuation Act, which was substantially repealed by Transportation Act of 1933. Trackage rights complicated efforts to avoid "double" valuation for a line, and to apportion true values among carriers. However, the ICC did not have authority to approve trackage rights until Transportation Act of 1940, with its mandatory employee protective conditions. In the period between 1920 and 1940, trackage rights were treated as extensions of line, and came under what is now licensed by 49 U.S.C. 10901.

The 1931 (actually 1918) definition of trackage rights has not been accorded any deference thereafter. The former ICC in 1967 termed the definition "broad" in finding a transaction not to be trackage rights. Seaboard Air Line R. Co. Trackage Rights, 331 I.C.C. 361, 364 (1967).

The Staff's definition of trackage rights would restrict the ability of carriers to contract, and would reduce the opportunities for rail carrier employees to secure the trackage rights employee protection mandated by the U.S. Congress since 1940.

I would appreciate your prompt attention to this communication. All parties have been notified by telephone, with an opportunity for transmission by facsimile or by personal service.

Very truly yours,



Atty. for John D. Fitzgerald

cc: All parties

Declaratory Order—Weight of Rail. At issue is a request by the National Railroad Passenger Corporation (Amtrak) that the Board determine that Amtrak has rehabilitated a 78-mile line of railroad track between Plaistow, New Hampshire, and Portland, Maine, owned by the “Guilford Rail System” according to the terms of a 1999 Board decision.

- STB Finance Docket No. 33995, *SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL*, and STB Finance Docket No. 33996, *Kern W. Schumacher and Morris H. Kulmer—Continuance in Control Exemption—SF&L Railway, Inc.*, and STB Docket No. AB-448 (Sub-No. 2X), *SF&L Railway, Inc.—Abandonment Exemption—in Hancock, McDonough, Fulton and Peoria Counties, IL*. At issue is an SF&L Railway, Inc. (SF&L) petition asking the Board to reopen and reconsider its October 2002 decision revoking various exemptions from regulation concerning SF&L’s acquisition of an approximately 72-mile portion of railroad line (the “La Harpe Line”) from the “Toledo, Peoria and Western Railway” (TP&W), and ordering the reconveyance to TP&W of SF&L’s interest in the La Harpe Line.

- STB Docket No. AB-565 (Sub-No. 11X), *New York Central Lines, LLC—Abandonment—Exemption—in Lake County, OH*, and STB Docket No. AB-55 (Sub-No. 617X), *CSX Transportation, Inc.—Discontinuance of Service Exemption—in Lake County, OH*. At issue is a “New York Central Lines” (NYC) and “CSX Transportation” (CSX) petition seeking an exemption from the Board’s prior-approval regulations allowing NYC to abandon, and CSX to discontinue service over, an approximately three-mile section of track in Lake County, Ohio.

- STB Finance Docket No. 34114, *Yolo Shortline Railroad Company—Lease and Operation Exemption—Port of Sacramento*. At issue is a “Union Pacific Railroad” (UP) petition asking the Board to reject the notice of exemption from agency regulation to lease and operate approximately 3.1 miles of rail line in West Sacramento, California, or to revoke the exemption authority that became effective as a result of that notice. The notice of exemption at issue was filed with the Board in 2001 by the “Yolo Shortline Railroad.”

- STB Finance Docket No. 34304, *The Burlington Northern and Santa Fe Railway Company—Trackage Rights Exemption—The Portland & Western Railroad, Inc.* At issue is a notice of exemption concerning trackage rights (the use of a railroad’s track, for a rental fee, by another railroad). The “Burlington Northern and Santa Fe Railway” (BNSF) filed a motion for the Board to dismiss a notice of exemption from agency regulation filed by BNSF allowing BNSF to obtain “overhead” trackage rights to operate over a portion of a line that BNSF owns, but now operationally leases, to the “Portland & Western Railroad.” BNSF asserts that the Board’s separate authorization of the trackage rights at issue is unnecessary.

- Ex Parte No. 282 (Sub-No. 20), *Railroad Consolidation Procedures: Class Exemption for Temporary Trackage Rights Transactions*. At issue is a Board proposal to establish a new class exemption that railroads could use to obtain limited-term authorization of trackage-rights arrangements that, by their terms, expire on a certain date. The current class exemption for trackage-rights arrangements between railroads gives railroads authorization that extends