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November 10, 2006
VIA: UPS overnight

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Mercury Building, #711
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 34951 (Sub-No. 1)
Portland & Western Railroad, Inc.
– Trackage Rights Exemption –
BNSF Railway company
Petition for Partial Revocation

FILED
218068
NOV 13 2006

Dear Secretary Williams:

Enclosed for filing please find the original and 10 copies of a Petition for Partial Revocation. A check in the amount of \$200 representing the filing fee is also enclosed.

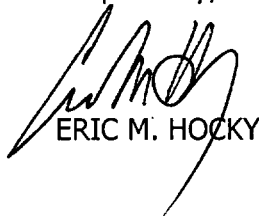
Please time stamp the extra copy of the Petition to indicate receipt, and return it to me in the stamped self-addressed envelope provided for your convenience.

Respectfully,

ENTERED
Office of Proceedings

NOV 13 2006

Part of
Public Record


ERIC M. HOCKY

Enclosures

RECEIVED

NOV 13 2006

**SURFACE
TRANSPORTATION BOARD**

GOLLATZ, GRIFFIN & EWING, P.C.



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34951 (Sub-No. 1)

PORTLAND & WESTERN RAILROAD, INC.

- TRACKAGE RIGHTS EXEMPTION -

BNSF RAILWAY COMPANY

**PETITION FOR PARTIAL REVOCATION
TO PERMIT EXPIRATION OF TRACKAGE RIGHTS**

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Attorney for
Portland & Western Railroad, Inc.

DATED: November 10, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34951 (Sub-No. 1)

**PORTLAND & WESTERN RAILROAD, INC. AND
- TRACKAGE RIGHTS EXEMPTION -
BNSF RAILWAY COMPANY**

**PETITION FOR PARTIAL REVOCATION
TO PERMIT EXPIRATION OF TRACKAGE RIGHTS**

On November 3, 2006, Portland & Western Railroad, Inc. ("PNWR"), a Class III railroad, filed a Notice of Exemption pursuant to 49 C.F.R. §1180.2(d)(7) to exempt from the provisions of 49 U.S.C. §11323 the grant of overhead trackage rights by BNSF Railway Company ("BNSF") to PNWR. The trackage rights agreement provides that the rights granted will expire on May 30, 2016.¹ PNWR is filing this Petition for Partial Revocation seeking authority to allow the expiration of the trackage rights upon the negotiated termination date, without the need to seek discontinuance authority at that time. BNSF agrees with the relief requested. Revocation is consistent with the rail transportation policy as set forth in 49 U.S.C. §10101, is of limited scope and regulation is not required to protect shippers from abuse of market power.

Background

PNWR and BNSF entered into a written trackage rights agreement under which PNWR was granted overhead trackage rights over lines of BNSF between Portland, Oregon, and Vancouver, Washington, a distance of approximately 13.31 miles. Based on the negotiated

¹ A "public" version of the trackage rights agreement which reflects the negotiated termination date was attached to the Notice of Exemption filed with the Board on November 3, 2006. The termination date can be found in Article III.

commercial terms, the parties agreed that the trackage rights would terminate on May 30, 2016. PNWR filed a Notice of Exemption pursuant to 49 C.F.R. §1180.2(d)(7) with the Board on November 3, 2006, and the trackage rights are effective as of November 10, 2006. The purpose of this petition is to partially revoke the trackage rights exemption that PNWR in order to allow the trackage rights to expire on the termination date negotiated by the parties.

Discussion

Although PNWR and BNSF expressly agreed in the written agreement governing these trackage rights that they should expire on May 30, 2016, the trackage rights would normally remain effective indefinitely until PNWR received authority to discontinue the rights. *See Railroad Consolidation Procedures – Exemption for Temporary Trackage Rights*, STB Ex Parte No. 282 (Sub-no. 20), served February 10, 2003, at 2-3 (“*Temporary Trackage Rights Exemption NPR*”).

The Board has adopted regulations creating a class exemption for “temporary trackage rights” that allow overhead trackage rights in given circumstances to automatically terminate on a date negotiated by the parties. *See* 49 C.F.R. §§1180.2(d)(8); 1180.4(g). However, the class exemption is applicable only if the term of the temporary trackage rights is less than one year. In this instance, the parties have negotiated a term of approximately 20 years, and therefore, the class exemption does not apply.

The Board is directed by 49 U.S.C. §10502 to grant an exemption from regulation if it finds that (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101, and (2) either the transaction is limited in scope or regulation is not needed to protect shippers from the abuse of market power. Allowing the trackage rights in this proceeding to

expire in accordance with the negotiated agreement would be fully consistent with the standards of Section 10502. Detailed scrutiny of a discontinuance application is not required to carry out the transportation policy of 49 U.S.C. §10101, and the transaction is clearly limited in scope and will not result in any abuse of market power.

In similar situations, the Board has “routinely” granted individual petitions to allow trackage rights to expire on a negotiated date. *Temporary Trackage Rights NPR*, at 3. *See, e.g., Union Pacific Railroad Company – Temporary Trackage Rights Exemption(Modification) – The Burlington Northern and Santa Fe Railway Company*, STB Finance Docket No. 34554 (Sub-No. 3), served March 25, 2005; *The Burlington Northern and Santa Fe Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company*, STB Finance Docket No. 34316 (Sub-No. 1), served May 16, 2003.

The grant of this Petition is necessary for the parties to realize the negotiated economic benefits of the trackage rights, and BNSF would not have granted the rights if not for their limited nature. The relief requested is clearly limited in scope in that the underlying transaction only involves less than 14 miles of trackage rights. Further, since only overhead rights are involved, regulation is not required to protect shippers. In proposing the temporary trackage rights exemption, the Board found:

Individual approval of trackage rights transactions for which the carriers seek authorization for a limited period of time does not appear to be necessary to carry out the goals of the RTP. Rather, exempting such proposals as a class would promote the RTP by eliminating the need to file a second pleading seeking discontinuance when the agreement expires, thereby minimizing regulation of the rail system (49 U.S.C. 10101(2)), promoting the continuation of a sound rail system by facilitating the process of line repair and maintenance (49 U.S.C. 10101(4)), and promoting coordination between rail carriers (49 U.S.C. 10101(5)). The proposed class exemption would also reduce the regulatory uncertainty of the parties, facilitate the parties’ ability to reach agreement on

temporary trackage rights, reduce the filing fees required of carriers seeking such rights, and encourage more use of trackage rights in general and temporary trackage rights in particular. 49 U.S.C. 10101(7), (15).

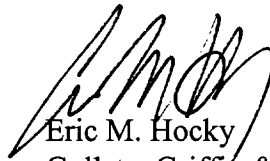
Temporary Trackage Rights Exemption NPR, at 3. For the same reasons that the Board adopted the class exemption, it should allow the trackage rights in this proceeding to expire at the time negotiated by the parties. In addition to the policies cited by the Board, the grant of the requested relief will not adversely affect any of the other 15 items which have been made a part of rail transportation policy by 49 U.S.C. §10101.

As with the class exemption for temporary trackage rights, PNWR understands that at the time of the expiration of the rights, any employees adversely affected by the discontinuance of these temporary trackage rights will be entitled to protection under the conditions imposed in *Oregon Short Line Railroad Co. – Abandonment – Goshen*, 360 I.C.C. 91 (1979).

Conclusion

For the foregoing reasons, PNWR requests that the Board grant this Petition for Partial Revocation and permit the trackage rights to expire on May 30, 2016, in accordance with the terms of the written trackage rights agreement between the parties.

Respectfully submitted,



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