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SERVICE DATE - MARCH 11, 1997

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Finance Docket No. 32765<sup>2</sup>

PORTLAND & WESTERN RAILROAD, INC.--TRackage RIGHTS  
EXEMPTION--BURLINGTON NORTHERN RAILROAD COMPANY

Finance Docket No. 32766

PORTLAND & WESTERN RAILROAD, INC.--LEASE AND OPERATION  
EXEMPTION--LINES OF BURLINGTON NORTHERN RAILROAD COMPANY

Decided: February 28, 1997

BACKGROUND

Portland & Western Railroad, Inc. (PWR) is a short line carrier operating over 57 miles of line in northwestern Oregon. On September 22, 1995, PWR filed a petition for exemption,<sup>3</sup> in Finance Docket No. 32766, to lease five unconnected line segments, totaling an additional 53 miles,<sup>4</sup> from Burlington

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> These proceedings are not consolidated. A single decision is being issued for administrative convenience.

<sup>3</sup> PWR concurrently filed, in Finance Docket No. 32765, a notice of exemption under 49 CFR 1180.2(d)(7) to acquire temporary, interim trackage rights over the same lines. The trackage rights were to expire if and when the ICC granted the petition for exemption for the lease transaction. The notice of exemption was served and published on October 13, 1995 (60 FR 53434). Contrary to protestant's contentions, trackage rights exemptions may be granted for a limited term, rather than in perpetuity. See Union Pacific Railroad Company--Trackage Rights Exemption--Chicago, Central & Pacific Railroad Company, STB Finance Docket No. 32959 (Sub-No. 1) (STB served July 25, 1996), and cases cited therein.

<sup>4</sup> The lines are situated in northwestern Oregon, generally between Salem and Portland. They are described as follows: (1) 1.96 miles between BN milepost 16.87 near Bowers Junction and BN milepost 18.83 near Bendemeer; (2) 10.77 miles between BN

(continued...)

Northern Railroad Company (BN).<sup>5</sup> The United Transportation Union (UTU) opposed the petition.<sup>6</sup>

In a decision served and notice published at 61 FR 414 on January 5, 1996, the ICC granted the petition for exemption. On January 30, 1996, UTU filed a petition to reopen the ICC's decision. On February 20, 1996, PWR replied.

UTU questions whether the transaction serves any commercial purpose. The union argues that the only effect of the transaction will be to transfer 10 positions from the BN, a union carrier, to the nonunion PWR. The union contends that, under the agreement, PWR has become the agent of BN, not its lessee. The union points to approximately one dozen different lease provisions that UTU claims show an agency relationship. UTU argues that the lease is merely part of a scheme by BN to use PWR to move a significant portion of BN's Portland area traffic while reducing BN's labor costs.

UTU claims that this is a sham transaction such as has been criticized by both the ICC and the courts. In Burlington Northern R. Co. v. United Transp. Union, 862 F.2d 1266 (7th Cir. 1988), the court held that a trackage rights agreement between the BN and a subsidiary, the Winona Bridge Railway Company (Winona Bridge), was an attempt by BN to evade the obligations of its collective bargaining obligations by transferring work to Winona Bridge. The ICC made similar sham transaction findings in Sagamore National Corporation--Acquisition and Operation

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<sup>4</sup>(...continued)

milepost 17.07 at Bowers Junction and BN milepost 27.84 near Banks; (3) 5.60 miles between BN milepost 4.68 near Hillsboro and BN milepost 10.28 near Forest Grove; (4) 1.19 miles between BN milepost 25.52 near St. Marys Junction and BN milepost 26.71 near St. Marys; and (5) 33.42 miles between BN milepost 31.28 near Greton and BN milepost 64.70 near Hopmere. As part of the transaction, BN also was to assign to PWR 4.2 miles of overhead trackage rights over the line of the Port of Tillamook Bay Railroad (POTB) that connects to the BN lines, between milepost 770.5 near Schefflin and milepost 774.7 near Banks.

<sup>5</sup> The ICC approved the common control and merger of BN and The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) in Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Aug. 23, 1995). On December 31, 1996, Santa Fe merged with and into BN. The name of the surviving corporation is The Burlington Northern and Santa Fe Railway Company. For simplicity, we will refer to this carrier as "BN" throughout this proceeding.

<sup>6</sup> UTU has objected to PWR's filing of a redacted copy of its lease. Our regulations permit parties to submit redacted copies of agreements. See 49 CFR 1104.14 and Bar Ale, Inc. v. California Northern Railroad Co. and Southern Pacific Transportation Company, STB Finance Docket No. 32821 (STB served Aug. 21, 1996), which concerned confidential matter in a lease of track. Nevertheless, an understanding of the notice of the transaction requires that the effect, if not the details, of the contractual provisions be discussed in this decision.

Exemption--Lines of Indiana Hi-Rail Corporation, Finance Docket No. 32523 (ICC served Oct. 28, 1994). There, a carrier with a collective bargaining agreement purported to "sell" its lines to a newly created carrier, Sagamore National, controlled by the same owners as controlled the seller. The ICC disapproved the transaction and ordered the lines returned to the seller.

PWR defends the lease as a bona fide agreement transferring possession of the rail lines to it in return for the payment of compensation to BN. PWR points to various provisions of the agreement that it believes support its position.

#### DISCUSSION AND CONCLUSIONS

Here, the UTU alleges that this transaction does not really give PWR the kind of business control and opportunity for profit that are usually associated with a lease of active rail lines. Our examination of the lease suggests to us that there may be a basis for this concern. Sales and leases from a line haul railroad to an interlining short line carrier typically protect the larger carrier against competition from the short line and against other actions by the short line that might be inimical to the interests of the line haul carrier. But we have seen few, if any, contracts that have left the short line with less control than PWR has here.

BN appears to control almost every aspect of PWR's business except local service, of which there appears to be none.<sup>7</sup> The lease:<sup>8</sup> requires only a nominal rental payment by PWR; effectively prohibits PWR from interlining with the Southern Pacific Transportation Company (SP) (now under common control with the Union Pacific Railroad Company), the other Class I railroad with which it connects; gives BN control over PWR rates on all interline traffic with SP; allows BN to retain the right to operate unit coal trains over the line, without compensation to PWR; provides that BN may declare PWR in default in connection with the lease if PWR fails to provide 5-day a week service if requested by either a customer or BN; provides that BN pays PWR \$295 per car for each loaded car it tenders to or receives from PWR; requires PWR to pay BN a "royalty" of the total gross revenue earned by PWR on local traffic and on traffic originating or terminating on 4 specific carriers: the Willamette and Pacific Railroad (WPRR), the Port of Tillamook Bay Railroad (POTB), the Willamina and Grand Ronde Railway Co. (WGR), and the Willamette Valley Railway (WVRD); authorizes BN to control the interline marketing programs of the PWR; and provides that BN will handle all claims for loss and damage, but that PWR will be liable to BN for any loss and damage claim not attributable to the sole negligence of BN.

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<sup>7</sup> UTU has asserted that there is no local service on the line and PWR has not disputed the assertion.

<sup>8</sup> PWR requested that a number of the terms of the lease, particularly those involving the compensation to be provided by PWR to BN, kept confidential. We must decide the effect of those provisions, if not their particulars, in order to convey an understanding of our concerns and to explain adequately the basis of our decision here.

In acquiring a line on which it seeks to earn a return, a railroad usually attempts to ascertain its costs and obtain control over the management of the line. The railroad can then increase its return by the application of industry and enterprise. But the opportunity to do so seems largely absent from this lease. PWR appears to have virtually no control over how much money it earns under the lease.

BN exerts great influence over PWR's operations--indeed, BN has the authority to demand 5-day a week service from PWR, even if none of PWR's customers has sought it. A railroad's service obligations are usually determined by the needs and demands of its shippers, not by the demands of another carrier. PWR pays BN a royalty on PWR's local traffic, and also when PWR interlines with carriers other than BN, even though BN does nothing to earn any revenue on such a movement. PWR gets no revenue from, and exercises no control over, BN's unit train movements, as those movements would evidently occur over the line as though PWR were not leasing the line.

On the other hand, PWR pays only a token rental amount for the line and, while BN benefits from PWR's maintenance of the line, BN has no assured income. PWR obtains revenue, of course, and performs a service for the revenue. But that would have been true of Sagamore National and Winona Bridge as well. While PWR stresses its interline movement of 30 cars of fertilizer with POTB, the record does not indicate whether this movement occurred due to any initiative by PWR or whether it would have occurred had BN continued to operate the line. Nor does the record indicate whether this is a one-time occurrence or whether PWR interlines any significant amount of traffic with any carrier other than BN.

We conclude that the existing record raises sufficient doubt as to whether the agreement between PWR and BN is a bona fide agreement. We specifically direct PWR to submit the following information:

1. Total traffic carried under the lease;
2. Total revenues earned by PWR pursuant to the lease;
3. Total costs incurred by PWR pursuant to the lease;
4. Total traffic interchanged by PWR with each of the following carriers--BN, SP, POTB, WPRR, WGR, WVRD, and any other carrier;
5. Total local traffic that moved over PWR during the period of the lease, i.e., traffic that originated and terminated on PWR; and
6. Total number of unit trains that operated over the PWR during the period of the lease.

In addition, we will direct PWR to serve a copy of this decision on BN, to give that carrier the opportunity to participate. Finally, PWR, in its petition for exemption, claimed that a grant would be pro-competitive. PWR should offer evidence to support this assertion. Specifically, PWR should demonstrate whether and how it is able to offer improved and

competitive rail services within the financial and operational limitations of the lease agreement.

If it has not already done so, PWR should serve UTU with a complete redacted copy of its lease, including the appendices. PWR should also provide a protective order that UTU could sign, which would entitle its retained counsel to receive an unredacted copy of the agreement.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The proceeding in Finance Docket No. 32766 is reopened for the submission of supplemental evidence.
2. PWR's (and BN's) opening statement is due April 10, 1997.
3. UTU's reply statement is due April 30, 1997.
4. PWR's (and BN's) rebuttal statement is due May 12, 1997.
5. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen. Vice Chairman Owen commented with a separate expression.

Vernon A. Williams  
Secretary

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**VICE CHAIRMAN OWEN, commenting:**

The unions make a good point here, inasmuch as under the facts, as they exist today, it is hard to see what if any commercial advantages enure here to the benefit of PWR. In other words, given the level of **control** that the BN *seemingly* is permitted to exercise over the PWR's ability to generate revenues of any kind, one is left wondering why and for what purposes the PWR exists.

Moreover, in the context of proceedings such as this, I find the commercial relationship between the PWR and the BN particularly perplexing and unsettling, given the previous rulings of strong admonition, from both this Board and the courts, in cases like Winona Bridge and Sagamore National.

Applicants, such as the PWR, certainly deserve the benefit of the doubt. On the other hand, given the severity of the issues in such cases, we would expect such applicants to put forth at the outset a more overwhelming evidentiary presentation. I caution the applicants here, and for that matter, any applicants similarly situated, to address seriously the concerns

that we raise here, and to do its best in supplementing the record as prescribed on this day by this Board.