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SERVICE DATE - NOVEMBER 16, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33662 (Sub-No. 1)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY--  
TRACKAGE RIGHTS EXEMPTION--OMAHA PUBLIC POWER DISTRICT

Decided: November 5, 1998

By petition filed September 28, 1998, The Burlington Northern and Santa Fe Railway Company (BNSF or petitioner) requests that the Board permit the trackage rights arrangement exempted in STB Finance Docket No. 33662<sup>1</sup> to extend only until December 31, 1998.

According to petitioner, the trackage rights arrangement exempted in STB Finance Docket No. 33662 is necessary because it permits BNSF to use its own trains and crews to operate over OPPD's line through the end of the calendar year, at which time Kyle Railroad Company will assume operations over the line.<sup>2</sup>

Although the parties have expressly agreed on the terms of the proposed trackage rights arrangement, trackage rights approved under the class exemption normally remain effective

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<sup>1</sup> On September 22, 1998, BNSF filed a notice of exemption under the Board's class exemption procedures at 49 CFR 1180.2(d)(7). The notice covered the agreement by Omaha Public Power District (OPPD) to authorize temporary local trackage rights to BNSF over OPPD's rail line between milepost 56.3 in Collegetown and milepost 6.0 in Arbor, in Otoe and Lancaster Counties, NE, a distance of approximately 50.3 miles. See The Burlington Northern and Santa Fe Railway Company--Trackage Rights Exemption--Omaha Public Power District, STB Finance Docket No. 33662 (STB served Oct. 7, 1998). The exemption became effective on September 29, 1998, 7 days after the verified notice was filed, and the trackage rights agreement was scheduled to be consummated on October 1, 1998.

<sup>2</sup> See Kyle Railroad Company--Acquisition and Operation--Omaha Public Power District, STB Finance Docket No. 33642 (STB served Aug. 25, 1998).

indefinitely regardless of any durational contract provisions.<sup>3</sup> Occasionally, trackage rights exemptions have been granted for a limited term rather than in perpetuity. See The Burlington Northern and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33574 (Sub-No. 1) (STB served Apr. 24, 1998); The Burlington Northern and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33612 (Sub-No. 1) (STB served July 1, 1998); and Union Pacific Railroad Company--Trackage Rights Exemption--The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33631 (Sub-No. 1) (STB served July 30, 1998).

Under 49 U.S.C. 10502, we may exempt a person, class of persons, or a transaction or service, in whole or in part, when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either the transaction or service is of limited scope, or regulation is not necessary to protect shippers from the abuse of market power.

BNSF's trackage rights have already been authorized under the class exemption at 49 CFR 1180.2(d)(7). See Railroad Consolidation Procedures, 1 I.C.C.2d 270 (1985). Limiting the term of the trackage rights is consistent with the limited scope of the transaction previously exempted and will have no adverse impact on shippers on the line as another carrier will then institute service over the line. Therefore, we will grant the petition and permit the trackage rights exempted in STB Finance Docket No. 33662, to expire on December 31, 1998.

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

It is ordered:

1. Under 49 U.S.C. 10502, we exempt the trackage rights described in STB Finance Docket No. 33662, as discussed above, to permit the trackage rights to expire on December 31, 1998.
2. Notice will be published in the Federal Register on November 16, 1998.
3. This decision is effective on December 16, 1998.

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<sup>3</sup> In the absence of the relief sought here by exemption, petitioner would ordinarily need to seek either discontinuance authority under 49 U.S.C. 10903 or approval of a new agreement. See Milford-Bennington Railroad Company, Inc.--Trackage Rights Exemption--Boston and Maine Corporation and Springfield Terminal Railway Company, Finance Docket No. 32103 (ICC served Sept. 3, 1993).

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4. Petitions to reopen must be filed by December 7, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary