

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34345 (Sub-No. 1)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY–TRACKAGE  
RIGHTS EXEMPTION–UNION PACIFIC RAILROAD COMPANY

Decided: May 23, 2003

By petition filed on May 6, 2003, The Burlington Northern and Santa Fe Railway Company (BNSF) requests that the Board partially revoke the class exemption to permit the trackage rights arrangement exempted in STB Finance Docket No. 34345<sup>1</sup> to expire on or about May 22, 2003.

BNSF states in its petition that the temporary trackage rights arrangement exempted in STB Finance Docket No. 34345 is necessary because it will be performing scheduled maintenance on its main line and will use these trackage rights as an alternative route for its traffic while the work is being performed. However, BNSF is only seeking, and UP is only willing to grant, temporary operating rights over UP's trackage during the period of maintenance activity on BNSF's trackage. BNSF also states that, without Board approval of temporary trackage rights, it is unlikely that any other arrangement could have been reached to allow it to operate over UP's line, and it would have faced the possibility of severe operational problems on the trackage for which maintenance is scheduled.

DISCUSSION AND CONCLUSIONS

Although BNSF and UP have expressly agreed on the term of the proposed temporary trackage rights arrangement, trackage rights approved under the class exemption normally remain effective indefinitely regardless of any durational contract provisions. Occasionally, trackage rights

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<sup>1</sup> On April 25, 2003, 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 Union Pacific Railroad Company (UP) to grant limited overhead trackage rights to BNSF over UP lines between Port Chicago, CA, at milepost 41.3 on UP's Tracy Subdivision, and Stege, CA, at milepost 9.3 on UP's Martinez Subdivision, a distance of approximately 28.7 miles – 6.3 on the Tracy Subdivision and 22.4 miles on the Martinez Subdivision. See The Burlington Northern and Santa Fe Railway Company–Trackage Rights Exemption–Union Pacific Railroad Company, STB Finance Docket No. 34345 (STB served May 15, 2003). The trackage rights operations under the exemption were scheduled to begin on May 2, 2003.

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. 34249 (Sub-No. 1) (STB served Oct. 1, 2002).

Under 49 U.S.C. 10502, the Board may exempt a person, class of persons, or a transaction or service, in whole or in part, when it finds 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 temporary 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 the trackage rights that are the subject of the exemption are for overhead traffic only. Therefore, the petition will be granted and the trackage rights exempted in STB Finance Docket No. 34345 will be permitted to expire on or about May 22, 2003.<sup>2</sup>

The Board grants the relief sought here, but recognizes that it does so in a situation that is unprecedented for it or for its predecessor agency, the Interstate Commerce Commission. The Board now temporarily has only one sitting member. Based upon a review of the relevant statutory provisions and case law on this issue, the Board continues to have the authority to take action under this circumstance. Under its governing statute, the Board's authority to act is not limited by "a vacancy," 49 U.S.C. 702(a)(7), and the general rule of statutory construction is that the singular encompasses the plural, and vice versa. 1 U.S.C. 1. Accord, Railroad Yardmasters of America v. Harris, 721 F.2d 1332 (D.C. Cir. 1983). This authority to act is not limited inasmuch as Congress expressly repealed the quorum provision that had applied to the Board's predecessor when it created the Board.

Additionally, the public interest would not be served if the Board were unable to act with a single member. The Board has exclusive authority over most aspects of the railroad industry. Without Board approval, carriers cannot construct new lines, sell or abandon existing lines, use another carrier's track, consolidate operations, or, as here, engage in routine activities such as using temporary trackage rights arrangements to permit continued operations during periods of railroad maintenance. Nor could the Board resolve rail rate and service disputes or address service disruptions. For many of these actions, the Board is required to act within a time established by statute. It is unreasonable to assume

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<sup>2</sup> Parties will not need to make this filing for temporary trackage rights approved pursuant to the new rule the Board recently voted to adopt. That rule will streamline the process for gaining Board approval in circumstances such as these so that parties may begin and end service as they have agreed under the terms of their trackage rights agreements.

that Congress intended for the Board's statutory obligations to languish in regulatory limbo in these circumstances.

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

It is ordered:

1. The petition for partial revocation is granted.
2. Under 49 U.S.C. 10502, the trackage rights described in STB Finance Docket No. 34345, are exempted as discussed above, to permit the trackage rights to expire on or about May 22, 2003.
3. Notice will be published in the Federal Register on May 30, 2003.
4. This decision is effective on May 23, 2003.
5. Petitions to reopen must be filed by June 19, 2003.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary