

SERVICE DATE – MARCH 11, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34554 (Sub-No. 11)

UNION PACIFIC RAILROAD COMPANY—TEMPORARY TRACKAGE RIGHTS
EXEMPTION—BNSF RAILWAY COMPANY

Decided: March 5, 2009

By petition filed on December 23, 2008, Union Pacific Railroad Company (UP) requests that the Board partially revoke the class exemption to permit the modified trackage rights arrangement exempted in STB Finance Docket No. 34554 (Sub-No. 10)¹ to expire on or about December 31, 2009.²

¹ On December 23, 2008, UP concurrently filed a verified notice of exemption under the Board's class exemption procedures at 49 CFR 1180.2(d)(7). The notice covered the agreement by BNSF Railway Company (BNSF) to extend to December 31, 2009, the expiration date of the local trackage rights granted to UP over BNSF's line of railroad between BNSF milepost 579.3 near Mill Creek, OK, and BNSF milepost 631.1 near Joe Junction, TX, a distance of approximately 51 miles. UP submits that the trackage rights are only temporary rights, but, because they are "local" rather than "overhead" rights, they do not qualify for the Board's class exemption for temporary trackage rights under 49 CFR 1180.2(d)(8). See Union Pacific Railroad Company—Temporary Trackage Rights Exemption—BNSF Railway Company, STB Finance Docket No. 34554 (Sub-No. 10) (STB served Jan. 8, 2009).

² The trackage rights were originally granted in Union Pacific Railroad Company—Temporary Trackage Rights Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 34554 (STB served Oct. 7, 2004). Subsequently, the parties filed notices of exemption several times based on their agreements to extend expiration dates of the same trackage rights. See STB Finance Docket No. 34554 (Sub-No. 2) (decision served February 11, 2005); STB Finance Docket No. 34554 (Sub-No. 4) (decision served March 3, 2006); STB Finance Docket No. 34554 (Sub-No. 6) (decision served January 12, 2007); and STB Finance Docket No. 34554 (Sub-No. 8) (decision served January 4, 2008). Because the original and subsequent trackage rights notices were filed under the class exemption at 49 CFR 1180.2(d)(7), under which trackage rights normally remain effective indefinitely, in each instance the Board granted partial revocation of the class exemption to permit the authorized trackage rights to expire. See STB Finance Docket No. 34554 (Sub-No. 1) (decision served November 24, 2004); STB Finance Docket No. 34554 (Sub-No. 3) (decision served March 25, 2005); STB Finance Docket No. 34554 (Sub-No. 5) (decision served March 23, 2006); STB Finance Docket No. 34554 (Sub-No. 7) (decision served March 13, 2007); and STB Finance Docket No. 34554 (Sub-No. 9) (decision served March 20, 2008). At the time of the extension

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UP states that the modified trackage rights arrangement exempted in STB Finance Docket No. 34554 (Sub-No. 10) is necessary to continue to permit UP to move loaded and empty ballast trains for use in its maintenance-of-way (MOW) projects. Thus, UP is only seeking, and BNSF is only willing to grant, temporary operating rights over BNSF's trackage until December 31, 2009.

DISCUSSION AND CONCLUSION

Although UP and BNSF have expressly agreed on the term of the proposed temporary trackage rights arrangement, trackage rights approved under the class exemption at 49 CFR 1180.2(d)(7) normally remain effective indefinitely, regardless of any durational contract provisions. Occasionally, trackage rights exemptions have been granted for a limited term rather than in perpetuity. See Union Pacific Railroad Company–Trackage Rights Exemption–The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 34242 (Sub-No. 1) (STB served Oct. 7, 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.

UP's temporary trackage rights already have 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 because the trackage rights that are the subject of the exemption are solely for the continued movement of loaded and empty ballast trains for use in UP's MOW projects. Therefore, we will grant the petition and permit the trackage rights exempted in STB Finance Docket No. 34554 (Sub-No. 10) to expire on or about December 31, 2009.³

The effect of this decision is to terminate the authorization for trackage rights conferred by our rule at 49 CFR 1180.2(d)(7). As noted, UP invoked that rule by notice on December 23, 2008. Because we are required to provide protection to any employee adversely affected by the discontinuance of trackage rights, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979).

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authorized in STB Finance Docket No. 34554 (Sub-No. 8), the parties anticipated that the authority to allow the rights to expire would be exercised by December 31, 2008. However, the parties filed on December 23, 2008 in STB Finance Docket No. 34554 (Sub-No. 10) their most recent notice of exemption so that the trackage rights could be extended to December 31, 2009, and in STB Finance Docket No. 34554 (Sub-No. 11) their latest petition to partially revoke the class exemption to permit expiration, which we are addressing here.

³ On December 29, 2008, UP filed the final agreement as executed by the parties.

This decision is consistent with the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 193, 121 Stat. 1844 (2007), because nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing, or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting, and shredding). The term “solid waste” is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

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. 34554 (Sub-No. 10) are exempted, as discussed above, to permit the trackage rights to expire on or about December 31, 2009, subject to the employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979).
3. Notice will be published in the Federal Register on March 11, 2009.
4. This decision is effective on April 10, 2009. Petitions to stay must be filed by March 23, 2009. Petitions to reopen must be filed by March 31, 2009.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary