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SERVICE DATE - DECEMBER 22, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33424

PORTLAND & WESTERN RAILROAD, INC.--ACQUISITION  
AND OPERATION EXEMPTION--THE BURLINGTON NORTHERN  
AND SANTA FE RAILWAY COMPANY

Decided: December 17, 1998

On July 3, 1997, Portland & Western Railroad, Inc. (PWR), filed a verified notice of exemption under 49 CFR 1150.41 from the provisions of 49 U.S.C. 10902 to acquire and operate approximately 91.66 miles of line owned by The Burlington Northern and Santa Fe Railway Company (BNSF), known as the Astoria Branch, between milepost 5.22 near Willbridge, OR, and milepost 96.88 near Tongue Point, OR.<sup>1</sup> The exemption became effective on July 10, 1997.<sup>2</sup> Also on July 10, 1997, John D. Fitzgerald, on behalf of the United Transportation Union--General Committee of Adjustment (UTU-GCA), filed a petition to reject, to revoke, and to stay the exemption, to which PWR replied. Notice of the exemption was served and published in the Federal Register on July 22, 1997 (62 FR 39301).<sup>3</sup> On August 1, 1997, UTU-GCA filed an appeal to the publication of the notice of exemption, arguing that the notice should have been rejected or stayed. PWR replied to the appeal.

By decision served July 6, 1998 (July 6 decision), we denied UTU-GCA's petition to revoke the exemption and its appeal. On July 27, 1998, UTU-GCA filed a petition for reconsideration under 49 CFR 1115.3, alleging new evidence and material error. On August 17, 1998, PWR replied.

PRELIMINARY MATTER

On August 26, 1998, UTU-GCA filed a motion to strike Exhibit A to PWR's reply and footnote 2, at page 3 of the reply. The exhibit and footnote were offered to show that, on July 9, 1997, PWR provided UTU-GCA with copies of the bill of sale, easement, and a portion of the agreement between PWR and BNSF relating to offers of employment for BNSF employees who

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<sup>1</sup> As part of the same transaction, BNSF granted incidental trackage rights to PWR over a 1.92-mile line between milepost 5.22 and milepost 3.30 near Willbridge Yard.

<sup>2</sup> The transaction was consummated on July 11, 1997.

<sup>3</sup> Because the notice of exemption became effective on July 10, 1997, the same day UTU-GCA's petition to stay was filed, the stay request was not considered.

might lose their employment with BNSF after the consummation of the sale of the Astoria Branch line to PWR.<sup>4</sup> Counsel for UTU-GCA argues that PWR, contrary to its statement, did not provide counsel with these documents. The UTU-GCA counsel further states that, while copies of these materials were sent by facsimile (FAX) to a number that he had previously used, it was not his current FAX number, and he did not receive copies of these documents. Counsel asserts that he was entitled to have mailed to him paper copies of these materials. Accordingly, counsel moves to have the exhibit and the reference to it in footnote 2 in the text of PWR's reply stricken from the record. PWR did not reply to the motion.

We will deny the motion. Counsel asserts that he did not receive the copies that PWR stated that it provided him. He has not shown, however, that PWR did not act in good faith by faxing the copies to a number formerly used by him. In any event, the motion to strike goes more to the weight we should accord PWR's statements that it provided him with copies rather than to their admissibility, and we now have counsel's statement and explanation that he did not receive the copies. Therefore, we will not strike the challenged exhibit and footnote from the record.<sup>5</sup>

#### DISCUSSION AND CONCLUSIONS

We see no basis on which to grant UTU-GCA's most recent petition. UTU-GCA submits that the agreement between BNSF and PWR, which was submitted in PWR's reply, filed July 30, 1997, to UTU-GCA's petition to revoke constitutes new evidence, but it is not new. Indeed, UTU-GCA points out that a confidential copy of the agreement was submitted to the Board, citing PWR's August 1, 1997 letter to the Board's Secretary. The agreement was considered when we issued our July 6 decision denying UTU-GCA's petition to revoke the exemption. UTU-GCA's remaining arguments that the transaction is not within the class exemption are essentially the same as its previous arguments, which we rejected in our July 6 decision where we found that UTU-GCA failed to demonstrate that regulation of this transaction is necessary or that any substantive basis exists for revocation of the exemption. Our previous review of this transaction demonstrated that it qualifies as a 49 U.S.C. 10902 transaction and falls within the class exemption at 49 CFR 1150.41. Accordingly, for the reasons stated in our July 6 decision, we will deny UTU-GCA's petition for

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<sup>4</sup> In its July 10, 1997 petition, UTU-GCA states that 4 trainmen and 2 engineers would have their jobs abolished by the sale.

<sup>5</sup> Counsel's argument that he should have been mailed copies of the documents is without merit. His request for information from PWR is governed by our informal discovery rules under which parties may respond to discovery requests either by producing copies of the requested materials or allowing the requesting party to inspect the documents and make copies. 49 CFR 1114.30. The manner in which parties fulfill these obligations is voluntary; and provided that they sufficiently satisfy the discovery request, any method of transmittal is acceptable. The mailing of paper copies is not a requirement under our discovery rules.

reconsideration.<sup>6</sup>

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

It is ordered:

1. UTU-GCA's petition for reconsideration is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

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<sup>6</sup> UTU-GCA also objects to our findings in the July 6 decision that affirmed that its stay request in this proceeding was filed too late to be considered. UTU-GCA acknowledges that its stay request now is moot, but reiterates its arguments on this matter. We will not reconsider these arguments and we affirm our July 6 findings.