

33322  
EB

SERVICE DATE - FEBRUARY 3, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34304

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY — TRACKAGE  
RIGHTS EXEMPTION — THE PORTLAND & WESTERN RAILROAD, INC.

Decided: January 31, 2003

On December 20, 2002, The Burlington Northern and Santa Fe Railway Company (BNSF) filed a verified notice of exemption under 49 CFR 1180.2(d)(7) to authorize it to obtain overhead trackage rights between milepost 68.6 at Bush, OR, and milepost 96.5 at Albany, OR, a distance of 27.9 miles.<sup>1</sup> These trackage rights allow BNSF to operate over part of a line that it owns, but that is now leased and operated by the Portland & Western Railroad, Inc. (P&WR), pursuant to exemption authority that became effective as a result of the notice in Portland & Western Railroad, Inc. — Lease and Operation Exemption — The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 34255 (STB served Jan. 3, 2003).<sup>2</sup>

According to BNSF, the trackage rights will facilitate: (1) the movement of trains containing loaded or empty cars interchanged with P&WR and other carriers having interchanges at Albany; or (2) pre-positioning or storage of cars as agreed to between BNSF and P&WR. The terms of the overhead trackage rights are set out in a Trackage Rights Agreement between BNSF and P&WR.<sup>3</sup>

On December 23, 2002, BNSF moved to dismiss the notice of exemption proceeding on the basis that separate Board authorization of the trackage rights is unnecessary. On December 30, 2002,

---

<sup>1</sup> Notice of the trackage rights exemption was served and published in the Federal Register on January 9, 2003 (68 FR 1214-15).

<sup>2</sup> Notice of the lease and operation exemption was published in the Federal Register on January 3, 2003 (68 FR 396), as corrected on January 9, 2003 (68 FR 1218).

<sup>3</sup> The Trackage Rights Agreement was originally filed under seal as Exhibit C to the Lease Agreement in STB Finance Docket No. 34255. BNSF included a copy of the Trackage Rights Agreement as Exhibit 2 in its verified notice of exemption in this proceeding, in accordance with 49 CFR 1180.6(a)(7)(ii).

John D. Fitzgerald, on behalf of the United Transportation Union-General Committee of Adjustment, filed a reply to BNSF's motion to dismiss. The Brotherhood of Maintenance of Way Employees also filed a reply on January 2, 2003. We will deny the motion to dismiss.

## DISCUSSION AND CONCLUSIONS

The acquisition of trackage rights by a rail carrier over a railroad line operated by another rail carrier requires prior Board approval under 49 U.S.C. 11323(a)(6).<sup>4</sup> BNSF, however, argues that Board authorization is not required in this case because there has been no transfer of trackage rights from P&WR to BNSF. BNSF asserts that the overhead trackage rights that P&WR has granted back to BNSF in this transaction should be considered to be "retained" trackage rights that were "retained" by BNSF when it leased the remainder of the property to P&WR. In this regard, BNSF maintains that this transaction is similar to the transaction in Minnesota Northern Railroad, Inc. — Exemption — Acquisition and Operation of Rail Line and Incidental Trackage Rights from Burlington Northern Railroad Company, STB Finance Docket Nos. 33315, et al. (STB served Aug. 14, 1997) (Minnesota Northern), in which BNSF retained overhead trackage rights and transferred less than its entire interest in the line in the lease to the Minnesota Northern Railroad. In that case, we found that the transaction, as structured, did not involve a transfer of trackage rights back to BNSF, and therefore did not require Board authorization.

This transaction is significantly different from the one in Minnesota Northern. The lease agreement in Minnesota Northern specifically stated that BNSF reserved overhead trackage rights. In this case, by contrast, we have examined the lease, which was filed under seal, and found nothing to indicate a reservation of trackage rights by BNSF. The characterization by P&WR in its verified notice of exemption filed in STB Finance Docket No. 34255 for the lease and operation transaction, as well as the language of the Trackage Rights Agreement itself, indicate that BNSF leased its entire interest in the line to P&WR and P&WR affirmatively granted back to BNSF trackage rights over the line segment. Section 1.2 of the Trackage Rights Agreement specifically states that P&WR grants BNSF the nonexclusive right to use the line segment, and sets restrictions on BNSF's operations under the grant of trackage rights. P&WR's verified notice of exemption in STB Finance Docket No. 34255 states that it will grant BNSF overhead trackage rights in order to preserve interchange arrangements among carriers. It is clear from the lease agreement, the Trackage Rights Agreement, and P&WR's prior representation concerning the transaction, that a transfer of trackage rights from P&WR to BNSF, not a retention of trackage rights by BNSF as part of the lease, is what has actually occurred here.

---

<sup>4</sup> A class exemption is in place to streamline authorization of written trackage rights agreements. 49 CFR 1180.2(d)(7).

BNSF also asserts that even if a transfer of trackage rights has occurred, Board authorization is not necessary because the trackage rights are “incidental” to the lease transaction and thus are encompassed within the scope of the class exemption pursuant to 49 CFR 1150.41(d).

We, and our predecessor agency, the Interstate Commerce Commission, have defined “incidental trackage rights” that can be included as part of a class exemption for acquisition and/or operation of a rail line as a grant of trackage rights to the purchaser or lessee by the seller, or the assignment of trackage rights to the purchaser or lessee to operate over the line of a third party, that occurs at the time of the acquisition or operation. See, e.g., Class Exemption for the Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 816 (1985), aff’d mem. Illinois Commerce Comm’n v. ICC, 817 F.2d 145 (D.C. Cir 1987). However, BNSF argues that the term “incidental” trackage rights should be read more broadly, to include circumstances in which a lessee agrees to grant overhead trackage rights back to the lessor over a portion of the leased rail line. BNSF cites a number of decisions in support of its claim that this transaction involves “incidental” trackage rights, but none of these cases supports BNSF’s contention.<sup>5</sup> BNSF is obtaining a grant back of trackage rights over a line it leased to P&WR in STB Finance Docket No. 34255. The trackage rights BNSF is obtaining are not incidental to the lease transaction and thus require separate authorization.

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

It is ordered:

1. The motion to dismiss is denied.

---

<sup>5</sup> Neither Alabama Southern R. Co., Inc., et al. — Exemption, 1 I.C.C.2d 298 (1984), nor Chicago, Missouri & Western Railway Company — Trackage Rights — Chicago South Shore and South Bend Railroad, Finance Docket No. 31038 (ICC served Dec. 3, 1987), involves a grant of trackage rights back to the seller as part of a line acquisition transaction. In ParkSierra Corporation (Successor-in-Interest to California Northern Railroad Company Limited Partnership) — Lease and Operation Exemption — Southern Pacific Transportation Company, STB Finance Docket Nos. 34126, et al. (STB served Dec. 26, 2001), there was a grant of trackage rights back to the lessor, and we found that those trackage rights were not “incidental” to the lease transaction, so separate authorization of the trackage rights was required.

2. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan.

Vernon A. Williams  
Secretary