

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 35601

BNSF RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
UNION PACIFIC RAILROAD COMPANY

REPLY TO PETITION TO REJECT AND REQUEST FOR STAY

BNSF RAILWAY COMPANY

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Dated: March 19, 2012

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BNSF Railway Company (“BNSF”) hereby responds to the Petition To Reject Notice Of Exemption And Petition For Stay Of Effective Date Of Exemption filed by Union Pacific Railroad Company (“UP”) with the Surface Transportation Board (“Board”) on March 15, 2012 (“Petition”).

I. BACKGROUND

In this proceeding, BNSF seeks trackage rights over the Lockport Branch between milepost 0.1, at Raceland Junction, and milepost 14.2, at Jay, in LaFourche Parish, LA. In STB Docket No. AB 33 (Sub-No. 277X), *Union Pacific Railroad Company – Abandonment Exemption – In Lafourche Parish, LA*, UP seeks to abandon the portion of the Lockport Branch between milepost 1.7, near Raceland, and milepost 14.2, near Jay (“Abandonment Proceeding”).¹ The trackage rights at issue in this proceeding are part of a much larger arrangement entered into

¹ In STB Docket No. AB 318 (Sub-No. 7X), Louisiana & Delta Railroad, Inc. (“L&D”) sought to discontinue its operations over the line UP seeks to abandon. L&D consummated its discontinuance on December 31, 2011.

by BNSF and UP in 1998, that has its geneses in the UP-SP merger.² See STB Finance Docket No. 33630, *Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company – Acquisition Exemption – Lines Between Dawes, TX, and Avondale, LA* (not printed), served September 29, 1998 (“*Dawes to Avondale Lines*”). As the Board noted in *Dawes to Avondale Lines*, the arrangement between BNSF and UP are intended “to improve service in general in the Houston/Gulf Coast region. Indeed, some of the earliest service problems that eventually led to the service emergency in the West occurred on this line.” Slip op. at 3-4. Moreover, the trackage rights at issue in this proceeding were not a unilateral act of kindness on the part of UP but a “quid pro quo” for significant rights granted to UP by BNSF. See Verified Statement of Mr. Jerry S. Wilmoth, then Director-Joint Facilities for UP at 2-3, attached as Exhibit D to the Joint Petition filed in STB Finance Docket No. 33630.

II. REPLY TO PETITION TO REJECT

In the Petition, UP erroneously alleges that “BNSF convinced the Board to stay the abandonment proceeding” (Petition at 2) and that “BNSF has manipulated the Board’s processes by obtaining a stay of UP’s abandonment” (Petition at 9). To the contrary, BNSF never requested a stay of the Abandonment Proceeding. Indeed, BNSF has not and does not oppose UP’s abandonment. BNSF has simply requested the Board not to allow UP to consummate its abandonment authority while BNSF works to locate a new customer on the Lockport Branch. UP also alleges that “BNSF plainly has no present intent to use the rights” sought in this proceeding (Petition at 8). UP’s allegation, however, ignores the filing made by Rail Solutions LLC (“Rail Solutions”) in the Abandonment Proceeding on February 13, 2012. As that filing

² *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996).

points out, Rail Solutions and BNSF have been working diligently to locate one of Rail Solutions' facilities adjacent to the Lockport Branch.

The Board should ignore the implication in the Petition that BNSF is simply attempting to harass UP. BNSF has been working to locate a major facility adjacent to the Lockport Branch, which will bring much needed jobs to the local area.

UP's sole argument in support of its request to have BNSF's Verified Notice of Exemption ("BNSF Notice") rejected is that this proceeding is not routine and non-controversial. But there is nothing controversial in this proceeding other than UP's trumped up allegations. BNSF simply seeks trackage rights over another carrier, UP, which are based on a written agreement not filed or sought in a responsive application in a rail consolidation proceeding. Thus, the BNSF Notice fully complies with the requirements of 49 C.F.R § 1180.2(d)(7).

UP does not allege that the Trackage Rights Agreement ("Agreement") attached as Exhibit B to the BNSF Notice is no longer operative, somehow defective, or defeasible. Rather, UP simply claims that this proceeding is controversial because UP opposes the BNSF Notice. UP's reliance on STB Finance Docket No. 35208, *Winamac Southern Railway Company – Trackage Rights Exemption – A. & R. Line, Inc.* (not printed) served January 9, 2009 ("*Winamac*") is misplaced. In *Winamac*, there was a controversy over whether the trackage rights agreement was still in effect. The Board correctly noted that "[t]his serious contractual dispute raises issues of state law that the Board is not in a position to resolve..." *Winamac* slip op. at 2. In this proceeding there is no dispute as to the effectiveness of the Agreement. Therefore, UP has no right to disown trackage rights it granted to another rail carrier particularly where, as here, it received significant rights in return.

If anything, it is the Abandonment Proceeding that is controversial. That proceeding raises the issue of whether the owner of a rail line can use the class exemption to abandon the line notwithstanding the fact that the owning rail carrier has granted various access and trackage rights to another rail carrier that is opposing the consummation of the abandonment. This issue becomes particularly acute where, as here, the access and trackage rights are related to conditions imposed by the Board in a merger proceeding. Consequently, if the Board is going to revoke the BNSF Notice it must also revoke UP's notice of exemption in the Abandonment Proceeding. *See* STB Docket No. AB-490X, *Greenville County Economic Development Corporation – Discontinuance of Service Exemption – In Greenville County, SC* (not printed), served January 29, 2004 (expedited class exemption for 2-year out of service rail lines is not appropriate where facts are in dispute and state court action was pending); Docket No. AB-167 (Sub-No. 1088), *Consolidated Rail Corporation – Exemption – Abandonment Of The Weirton Secondary Track In Harrison And Tuscarawas Counties, OH* (not printed), served June 14, 1989 (Notice of Exemption revoked because abandonment was controversial).

III. REPLY TO REQUEST FOR STAY

The standards governing disposition of a request for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Fed Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). It is the movant's obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978

(D.C. Cir. 1985), and the movant carries the burden of persuasion on each of the four elements required for the extraordinary relief. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

As is demonstrated below, UP has failed to meet its burden on all four elements.

A. Likelihood of Prevailing on the Merits:

UP claims that is likely to succeed on the merits of its Petition to reject the BNSF Notice. Petition at 10. In order to prevail on its Petition to reject, UP would have to demonstrate that the BNSF Notice contains false or misleading information. UP does not allege, much less demonstrate, that there is any false or misleading information in the BNSF Notice. UP contends that this proceeding is controversial and, therefore, should not qualify for the class exemption. UP's only support for this contention is that UP opposes the granting of the trackage rights. Mere opposition without any substantive grounds is not a basis for rejecting a notice of exemption.

Moreover, if the BNSF Notice were rejected, BNSF would simply be required to file a petition for exemption under 49 U.S.C. § 10502. It is inconceivable that the trackage rights at issue in this proceeding would not qualify for an exemption under Section 10502. The trackage rights are consistent with the majority of the provisions in the Rail Transportation Policy. 49 U.S.C. § 10101. The trackage rights are of limited scope and regulation of the trackage rights is not needed to protect shippers from the abuse of market power. Section 10502(a)(2). *See Railroad Consolidation Procedures*, 1 I.C.C.2d 270, 276-78 (1985). *See also Minnesota Comm. Ry., -- Trackage Exempt. – BN RR. Co.*, 8 I.C.C.2d 31, 37 (1991) for the standard that would apply if BNSF were to file an application under 49 U.S.C. § 11344(d). Because there is no

anticompetitive impact from the transaction, the Board must approve the application under that standard.

UP is not seeking to have the BNSF Notice rejected so that UP can substantively oppose the trackage rights in another proceeding. Rather, UP seeks rejection in the hopes that the Board will also lift the stay in the Abandonment Proceeding so that UP can consummate the abandonment and, thereby, have Board action frustrate the contractual commitment UP made to BNSF.

B. Irreparable Harm:

A stay is an extraordinary remedy and should not be sought unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by a stay. *See* STB Finance Docket No. 34824, *Tri-State Brick & Stone of N.Y., Inc. – Petition for Declaratory Order* (not printed), served February 12, 2008. Here, UP will suffer no harm, much less irreparable harm, if a stay is not granted. At the time the Agreement was entered into, BNSF and UP entered into a number of other agreements which specify the compensation UP is entitled to receive for BNSF's trackage rights operations over various UP rail lines, including the Lockport Branch. The agreed upon trackage rights compensation is all UP is entitled to receive, no more and no less.

C. Harm to Other Parties:

Contrary to UP's argument, BNSF, Rail Solutions, and the local community will be substantially harmed if the stay is granted. Rail Solutions is unlikely to commit locating a facility on the Lockport Branch as long as UP is not precluded from consummating the abandonment. Because there is an attractive facility on the Lockport Branch and given the time and funds expended by Rail Solutions to date pursuing that facility, a stay will substantially harm Rail

Solutions. Given the significant volume of traffic involved, a stay would also substantially harm BNSF. The Rail Solutions facility, if located on the Lockport Branch, will increase jobs and boost the local economy. Thus, a stay would also substantially harm the local community.

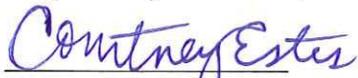
D. Public Interest:

UP has failed to show how a stay would be in the public interest. UP has simply alleged that granting the stay would be in its own private interest. Rail Solutions is currently deciding whether to locate a significant facility on the Lockport Branch which will have a positive effect on the labor market in the area and boost the local economy. Therefore, granting the stay cannot possibly be in the public interest.

IV. CONCLUSION

BNSF respectfully urges the Board to deny both UP's request to have the BNSF Notice rejected and UP's request to stay the effective date of the BNSF Notice. In so doing, the Board will hold UP to its contractual commitments, preserve rail service to the communities along the Lockport Branch, increase employment in the area and economically benefit the local community.

Respectfully submitted,



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Dated: March 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2012, I caused a copy of the foregoing Reply to be served by first class mail, postage prepaid on all parties of record in this proceeding and all parties of record in STB Docket No. AB 33 (Sub-No. 277X).



John Sims