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July 9, 2013



VIA COURIER

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

ENTERED
Office of Proceedings
JUL 09 2013
Part of
Public Record

**Re: BNSF Railway Company – Trackage Rights Exemption --
Union Pacific Railroad Company
STB Docket No. FD 35601**

Dear Ms. Brown:

Enclosed for filing are the original and 10 copies of a Petition to Intervene and for Reconsideration on behalf of Louisiana & Delta Railroad, Inc. Also enclosed is a check in the amount of \$250.00 representing the filing fee for this Petition.

Please time stamp the extra copy of this Petition to indicate receipt of all of the foregoing, and return it to our courier.

FEE RECEIVED

JUL 09 2013

**SURFACE
TRANSPORTATION BOARD**

FILED

JUL 09 2013

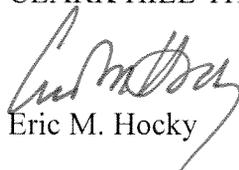
**SURFACE
TRANSPORTATION BOARD**

July 9, 2013
Page 2

Please let me know if there are any questions regarding this filing.

Very truly yours,

CLARK HILL THORP REED



Eric M. Hocky

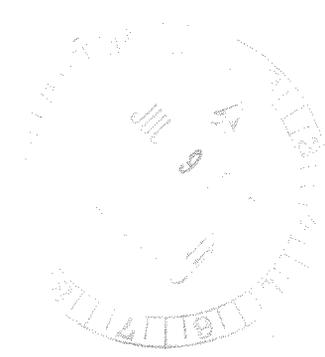
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cc: Courtney Estes – by First Class Mail and email -- w/encl.
Karl Morell – by First Class Mail and email -- w/encl.
Mack Shumate – by First Class Mail and email -- w/encl.
Michael Rosenthal – by First Class Mail and email -- w/encl.

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 35601

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



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PETITION TO INTERVENE AND FOR RECONSIDERATION

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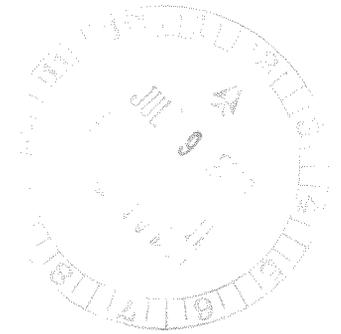
Dated: July 9, 2013

Attorneys for
Louisiana & Delta Railroad, Inc.

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 35601

**BNSF RAILWAY COMPANY
– TRACKAGE RIGHTS EXEMPTION –
UNION PACIFIC RAILROAD COMPANY**



PETITION TO INTERVENE AND FOR RECONSIDERATION

In a decision served June 19, 2013 (the “June 19 Decision”), the Board lifted a housekeeping stay and allowed a trackage rights notice of exemption filed by BNSF Railway Company (“BNSF”) to become effective.¹ The trackage rights would cover the entire Lockport Branch between milepost 0.1 near Raceland, Louisiana, and milepost 14.2 near Jay, Louisiana. Although Louisiana & Delta Railroad, Inc. (“LDRR”) is the lessee/operator of a portion of the Lockport Branch and would be affected by the decision, it was not a party to the trackage rights proceeding. Accordingly, LDRR seeks to intervene in the proceeding under 49 CFR 1112.4, and further requests that the Board reconsider its decision under 49 CFR 1115.3 due to the material errors described herein.²

¹ A single decision was issued in this proceeding and in *Union Pacific Railroad Company – Abandonment Exemption – In Lafourche Parish, LA*, STB Docket No. AB 33 (Sub-No. 277X) (“*UP Abandonment Proceeding*”). The portion of the decision related to the *UP Abandonment Proceeding* is not the subject of this petition.

² To the extent the Board determines that the appeal is to the exemption which has been allowed to take effect, then LDRR requests that the Board reopen the exemption and revoke it pursuant to 49 USC 10502(d) based on the same asserted material errors.

Background

In January, 1992, LDRR entered into a lease with Southern Pacific Transportation Company (“SP”) for the Lockport Branch [UP Evidence, App. Ex. A]³, and LDRR has been the exclusive operator of the Branch since that time.⁴ In a joint filing in October 2011, LDRR sought to discontinue, and UP sought to abandon, *a portion* of the Lockport Branch between milepost 1.7 and milepost 14.2 (the “Subject Line”). Notice of the two exemptions was served and published in the Federal Register on November 14, 2011. The notice related to both the *UP Abandonment Proceeding* and to the LDRR discontinuance proceeding, *Louisiana & Delta Railroad, Inc. – Discontinuance of Service Exemption – In Lafourche Parish, La.*, STB Docket No. AB 318 (Sub-No. 7X) (“*LDRR Discontinuance Proceeding*”). June 19 Decision, slip op. at 2. BNSF contested the right of UP to abandon the Subject Line claiming rights to serve directly customers on the Subject Line. UP, in turn, disputed BNSF’s claim. There were no objections to LDRR’s notice of discontinuance; the discontinuance became effective on December 14, 2011; and LDRR consummated the discontinuance effective December 31, 2011. June 19 Decision, slip op. at 2, n.4.

Although LDRR has discontinued its service over the Subject Line, it did not seek authority for, nor has it stopped operating over, the remainder of the Lockport Branch between milepost 0.1 and milepost 1.7 (the “Retained Segment”). LDRR retains its common carrier

³ The documents referred to LDRR in this Petition were submitted by UP and BNSF on February 9, 2012, in the companion *UP Abandonment Proceeding*. LDRR requests that the Board take notice of them in this proceeding since the issues raised in both proceedings were considered together. See *BNSF Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company*, STB Docket No. FD 35601 (served March 21, 2012), slip op. at 2. Documents submitted by UP will be referred to as “UP Evidence, App. Ex. __,” and documents submitted by BNSF will be referred to as “BNSF Comments, Ex. __.”

⁴ Union Pacific Railroad Company (“UP”) is the successor to SP under the Lease.

obligation to provide service to customers on the Retained Segment, and has continued providing service to its customers.

In January, 2012, the Board postponed the effective date of UP's abandonment and directed UP and BNSF to submit additional evidence and argument. BNSF and UP did so on February 9, 2012.

Shortly thereafter, on February 21, 2012, BNSF commenced this trackage rights exemption proceeding. BNSF attached a "First Supplemental Agreement" dated August 1, 2000 between itself and UP which BNSF claimed gave it trackage rights over the entire Lockport Branch. Despite the fact that LDRR continues to be the exclusive common carrier operator over the Retained Segment, BNSF did not serve LDRR with a copy of its trackage rights notice, nor did it provide to the Board a copy of any written trackage rights agreement with LDRR.⁵ UP filed a petition to reject BNSF's notice of exemption, and on March 21, 2012, the Board postponed the effective date of BNSF's trackage rights exemption until further order of the Board.

In both this proceeding and in the *UP Abandonment Proceeding*, BNSF claims that UP granted BNSF the right directly serve customers on the line between Dawes, Texas, and Avondale, Louisiana (the "50/50 Line") and on former SP branches and spurs that connect with the 50/50 Line, under a February 12, 1998 term sheet (the "Term Sheet") [BNSF Comments, Ex. 1 / UP Evidence, App. Ex. C], as well as an agreement dated September 1, 2000 between UP and BNSF that implemented the Term Sheet (the "50/50 Sale Agreement") [BNSF Comments, Ex. 2 / UP Evidence, App., Ex. E]. In October 2012, BNSF asked the Board to lift the stay on its trackage rights notice and confirm its right to directly serve customers on the Lockport Branch.

⁵ Indeed, no such agreement exists.

UP did not object to the Board confirming that BNSF could serve customers on the Lockport Branch, but only pursuant to the terms of the 50/50 Sale Agreement and the Term Sheet, and that the terms of those agreements should not be interpreted by the Board but should be left to arbitration. June 19 Decision, slip op. at 3-4.

In the June 19 Decision, the Board allowed UP to discontinue service over the Subject Line in the *UP Abandonment Proceeding*. Further, in this proceeding, the Board found that its prior decision approving the exchange covered by the 50/50 Sale Agreement, recognized that BNSF had access rights to the Lockport Branch, but the Board did not agree that trackage rights had been authorized over the Lockport Branch. June 19 Decision, slip op. at 6. Further, the Board did not find that the First Supplemental Agreement which BNSF attached to its notice of exemption, covered the trackage rights BNSF claimed under its notice, leaving the interpretation of the agreement and BNSF's rights to arbitration. June 19 Decision, slip op. at 7. Despite the dispute over the scope of the trackage rights agreement between BNSF and UP that was attached to BNSF's notice, the Board lifted the stay and allowed the trackage rights exemption to become effective.

Discussion

A. LDRR should be permitted to intervene.

Pursuant to 49 CFR 1112.4, the Board may grant a petition to intervene if intervention will not unduly disrupt the procedural schedule, and would not unduly broaden the issues raised in the proceeding. See *V&S Railway, LLC – Petition for Declaratory Order – Railroad Operations in Hutchison, Kan.*, STB Docket No. FD 35459 (served February 17, 2011), slip op. at 2-3. As noted above, LDRR seeks to intervene to protect its interests as the lessee/common carrier operator on the Retained Segment over which the Board has authorized BNSF trackage

rights. LDRR seeks to have BNSF's trackage rights over the entire Lockport Branch cancelled or revoked. LDRR's participation will not disrupt the schedule as it is filing this petition to intervene and for reconsideration within 20 days after the June 19 Decision as permitted under 49 CFR 1115.3(e).⁶ Moreover, since LDRR is asking for reconsideration based on material error and will rely on the existing record in this and the companion *UP Abandonment Proceeding*, the issues will not be unduly broadened. Accordingly, LDRR requests that the Board permit it to intervene in this proceeding for the purposes of raising this appeal. *See DesertXpress Enterprises, LLC – Petition for Declaratory Order*, STB Docket No. FD 34914 (served May 7, 2010) (allowing intervention and consideration of request to reopen and reverse 3 year old decision of the Board).

B. The Board should reconsider its decision allowing BNSF's trackage rights to become effective, and should cancel or revoke the trackage rights.

This proceeding commenced with the filing by BNSF of a notice of exemption under 49 CFR 1180.2(d)(7) for trackage rights over the Lockport Branch. As set forth in the regulation, the exemption applies to the acquisition of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are based on written agreements and are not filed or sought in responsive applications in rail consolidation proceedings. Pursuant to 49 CFR 1115.3, LDRR is asking the Board to reconsider its decision to allow the BNSF trackage rights exemption notice over the Lockport Branch to become effective because LDRR believes that BNSF's notice of exemption did not meet the criteria for the exemption and that it was material error for the Board not to reject the notice of exemption.

⁶ The petition would also be timely if the Board were to treat the petition as one to reopen and revoke under 49 USC 10502(d), since such petitions can be filed at any time.

1. BNSF's notice of exemption was defective and should have been rejected because BNSF does not have direct access rights to customers on the Lockport Branch.

BNSF's notice of exemption is premised on its claim that the 50/50 Agreement and the Term Sheet provide BNSF with direct access to customers on the Lockport Branch. The June 19 Decision found that BNSF was granted access to customers on the Lockport Branch, although the Board did not determine whether such access was direct. June 19 Decision, slip op. at 6. Despite that finding, the Board allowed local trackage rights over the entire Branch.⁷ LDRR maintains that UP did not (and could not legally) grant BNSF direct access to customers on the Lockport Branch, and that it was material error for the Board to allow BNSF local trackage rights on the Branch.

Under the Term Sheet, UP and BNSF granted each other the right to serve customers on the 50/50 Line and on former SP branches and spurs connecting to the 50/50 Line. However, that agreement should not and could not be read as granting any rights to serve customers on branches such as the Lockport Branch which had previously been sold or leased by SP. The Lockport Branch has been leased to LDRR since 1992 (well before the UP/SP merger, the Term Sheet or the 50/50 Sale Agreement), and UP as the successor to SP, had only residual service rights and no current rights to serve the customers on the Branch. As a result of the LDRR lease, UP had no legal authority to grant rights to BNSF on or over the Lockport Branch.

Under the 50/50 Sale Agreement which implemented the Term Sheet, when the definitions of "Customer Access Trackage," "Joint Trackage" and "UPRR Trackage" are read together, it is clear that, with respect to former SP branches and spurs, only those that were

⁷ Although required by the Board's regulations, BNSF's notice of exemption does not specify whether the trackage rights are local or overhead. However, from BNSF's discussion of direct access to customers, it appears that BNSF is seeking local trackage rights.

“[then] owned or controlled by UPRR or as is added to the ownership or control of UPRR” were to be subject to the access rights. Since the Lockport Branch was then controlled by LDRR and not by UP, no access rights were granted with respect to the Lockport Branch.⁸

In March 2002, BNSF and UP entered into a Restated and Amended Agreement (the “Restated Agreement”) [UP Evidence, App. Ex. F] which modified and restated a number of agreements between them, including the 50/50 Sale Agreement. With respect to the East Texas – Louisiana trackage rights and purchase covered by the 50/50 Sale Agreement, the Restated Agreement provided for the grant by UP of trackage rights over a number of lines, but significantly, not the Lockport Branch. Restated Agreement, §5(a), at 19-20. Additionally, the Restated Agreement provided only for limited direct local access at points specified in the Restated Agreement, none of which are located on the Lockport Branch. Restated Agreement, §5(b), at 20-21. Instead, BNSF was given the right to interchange with LDRR at, *inter alia*, Raceland at the end of the Lockport Branch. *Id.* Thus, the only access BNSF was granted to shippers on the Lockport Branch was indirect access via its connection with LDRR at Raceland, access that BNSF has exercised and which continues today.

Since it is clear that BNSF was not granted direct access to customers on the Lockport Branch, it was material error for the Board to allow BNSF to claim local trackage rights over the Branch.

2. **BNSF’s notice of exemption was defective and should have been rejected because BNSF does not have an agreement with LDRR as the common carrier operator, for trackage rights over the Retained Segment.**

Trackage rights provide for the joint use of tracks and must be authorized by the Board. 49 USC 11323. The Board cannot generally impose trackage rights on an unwilling operator.

⁸ To the extent LDRR continues to hold the common carrier obligations and to operate the Retained Segment, the Retained Segment is still not in the control of UP.

See Chesapeake & Ohio Railway Co. – Abandonment, 366 ICC 53, 54 (1981) (citations omitted). (There are limited exceptions such as in a consolidation proceeding or in connection with terminal trackage rights imposed under 49 USC 11102.) The exemption adopted by the Board thus requires a written agreement between the proposed trackage rights user and the common carrier that operates the tracks. 49 CFR 1180.2(d)(7). This volitional agreement of the parties is a keystone of the trackage rights notice of exemption. *See Winamac Southern Railway Company – Trackage Rights Exemption – A&R Line, Inc.*, STB Finance Docket No. 35208 (served January 9, 2009), slip op. at 2. In this instance, at the time BNSF filed its notice of exemption, LDRR was (and continues to be) the exclusive operator of the Retained Segment. BNSF did not submit, nor is there, a written agreement between BNSF and LDRR for trackage rights over the Retained Segment. Because there is no agreement for trackage rights over the Retained Segment, it was material error for the Board not to reject BNSF's notice, at least as to that segment between milepost 0.1 and milepost 1.7.

3. BNSF's notice of exemption was defective and should have been rejected because BNSF did not establish that it had a written agreement with UP for trackage rights over the Retained Segment.

The June 19 Decision, while allowing the trackage rights notice to become effective, specifically did not decide if the First Supplemental Agreement that BNSF attached to its notice covered trackage rights over the Lockport Branch. June 19 Decision, slip op at 6-7. The Board has made it clear that its notice of exemption procedures are only for routine and non-controversial cases, and that where there are unresolved issues (including those related to the existence or terms of a trackage rights agreement), it will reject the notice. *Winamac Southern, supra*, slip op. at 2. In similar situations, where there was a dispute over the continued validity of an agreement, the Board has rejected the notice and not allowed the trackage rights to become

effective. *See Winamac Southern, supra.* It was material error here for the Board to allow the trackage rights notice to become effective while at the same time ruling that BNSF's rights to those trackage rights under the First Supplemental Agreement needed to be determined through arbitration.

Conclusion

For the reasons set forth above, LDRR requests that the Board permit it to intervene in this proceeding, and further, that the Board reconsider its decision to allow the BNSF trackage rights notice to take effect. The Board should instead reject (or revoke) BNSF's notice of exemption.

Respectfully submitted,



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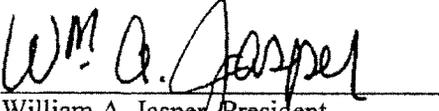
Dated: July 9, 2013

Attorneys for
Louisiana & Delta Railroad, Inc.

Verification

I hereby verify on behalf of Louisiana & Delta Railroad, Inc., under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on July 9, 2013.



William A. Jasper, President

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on the following persons, by first class mail, postage prepaid and by email:

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Dated: July 9, 2013