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E-FILED

Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
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ENTERED
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Part of
Public Record

Re: Finance Docket No. 35601, BNSF Railway Company --
Trackage Rights Exemption -- Union Pacific Railroad Company

Dear Ms. Brown:

Attached for filing with the Surface Transportation Board please find the Reply of BNSF Railway Company to the Petition To Intervene And For Reconsideration.

If you have any questions, please contact me.

Sincerely,

Karl Morell
Of Counsel

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35601

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

REPLY TO PETITION TO INTERVENE AND FOR RECONSIDERATION

EXPEDITED HANDLING REQUESTED

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Dated: July 29, 2013

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SURFACE TRANSPORTATION BOARD

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

REPLY TO PETITION TO INTERVENE AND FOR RECONSIDERATION

BNSF Railway Company (“BNSF”) hereby responds to the Petition To Intervene And For Reconsideration filed by Louisiana & Delta Railroad, Inc. (“LDRR”) with the Surface Transportation Board (“Board”) on July 9, 2013 (the “Petition”).

I. BACKGROUND

In this proceeding, BNSF sought trackage rights over the Lockport Branch between milepost 0.1, at Raceland Junction, and milepost 14.2, at Jay, in LaFourche Parish, LA. In Docket No. AB 33 (Sub-No. 277X), *Union Pacific Railroad Company – Abandonment Exemption – In Lafourche Parish, LA*, (“UP Abandonment Proceeding”), UP initially sought to abandon the portion of the Lockport Branch between milepost 1.7, near Raceland, and milepost 14.2, at Jay (the “Abandonment Segment”). UP subsequently changed its request and sought only to discontinue operations over the Abandonment Segment. In Docket No. AB 318 (Sub-No. 7X), LDRR sought to discontinue its operations over the Abandonment Segment. LDRR consummated its discontinuance effective December 31, 2011. LDRR continues to operate over the portion of Lockport Branch located between milepost 0.1 and milepost 1.7 (the “Retained Segment”).

By decision served June 19, 2013, in this proceeding, the Board lifted the housekeeping stay entered on January 20, 2012, in the UP Abandonment Proceeding, and lifted the housekeeping stay entered on March 21, 2012, in this proceeding (“June 19 Decision”). The Board authorized UP to discontinue service over the Abandonment Segment and allowed BNSF’s notice of exemption in this proceeding to become effective. In so doing, the Board refused to interpret BNSF access rights under the First Supplemental Agreement¹ noting that “[a]lthough BNSF makes a plausible argument that the First Supplemental Agreement provides it with the trackage rights it claims, we will leave this interpretation to an arbitrator in the first instance, consistent with the parties’ agreement.” Slip op. at 7. The Board was hopeful that this contractual dispute could be resolved quickly because the “situation involves a shipper that may want to receive service and a railroad that wants to provide service....” *Id.*²

II. EXPEDITED HANDLING REQUESTED

As the Board knows, BNSF has been working with at least one potential customer that has an interest in receiving service from BNSF along the Abandonment Segment. That potential customer, however, will not make the necessary substantial investment at a site along the Abandonment Segment while BNSF’s access over the Lockport Branch remains in litigation. BNSF and the potential customers seeking to locate along the Abandonment Segment cannot afford to wait another 16 months for a final decision from the Board. Any such delay will likely

¹ The First Supplemental Agreement is attached as Exhibit 2 to BNSF’s Comments filed on February 9, 2012 in the UP Abandonment Proceeding.

² It is BNSF’s position that the First Supplemental Agreement grants BNSF trackage rights over the Lockport Branch. If UP does not agree that the First Supplemental Agreement grants BNSF such trackage rights, BNSF will initiate arbitration against UP over BNSF’s access rights on the Lockport Branch.

force the potential customers to locate elsewhere and jeopardize any future rail operations along the Abandonment Segment.

In order for the Board to revoke BNSF's trackage rights as suggested by LDRR, the Board would have to interpret the First Supplemental Agreement as not granting BNSF direct access to customers located along the Lockport Branch. But interpreting the First Supplemental Agreement is a task the Board expressly declined to undertake in the June 19 Decision. Consequently, BNSF views LDRR's Petition as nothing more than a delay tactic such that, if BNSF's direct access remains in doubt, potential customers will locate elsewhere.

III. REPLY

Under 49 C.F.R. § 1112.4, the Board may grant a petition for intervention if intervention: (1) will not unduly disrupt the schedule for filing verified statements; and (2) would not unduly broaden the issues raised in the proceeding. Here, there is no pending proceeding in which LDRR can intervene, and the schedule for filing is long past. LDRR had over 16 months to make a filing in this proceeding but chose to sit on its hands while this proceeding was pending before the Board. Consequently, LDRR's Petition to Intervene should be denied as untimely and its request for reconsideration summarily rejected because LDRR is not a party to this proceeding.

If the Board does not reject LDRR's Request for Reconsideration, the request should be denied. The central premise of LDRR's argument is that UP did not, and legally could not, grant BNSF direct access to the Lockport Branch. Petition at 6. LDRR goes on to allege that "[a]s a result of the LDRR lease, UP had no legal authority to grant rights to BNSF on or over the Lockport Branch." Petition at 6. LDRR's allegations, however, are expressly contradicted by the 1992 Lease Agreement. Section 8(d) of the 1992 Lease Agreement between UP's predecessor, the Southern Pacific Transportation Company ("SPT"), and LDRR provides that:

“SPT represents that it is not, as of the date of this Agreement, and will not become during the term of this Agreement a party to any agreement or arrangement, except as set forth in this Agreement, that gives any third party a right superior to that of [LDRR] to lease and operate or to purchase the [Lockport Branch].”³

In other words, UP’s predecessor simply agreed not to give a third party rights superior to those granted LDRR in the 1992 Lease Agreement. Contrary to LDRR’s arguments, the 1992 Lease Agreement was not an exclusive lease, and SPT, or subsequently UP, had the right to grant third parties operating rights over the Lockport Branch as long as those rights were not superior to LDRR’s rights. BNSF has never suggested that the trackage rights it received in the First Supplemental Agreement are superior to LDRR’s rights. BNSF views its trackage rights over the Retained Segment as coterminous with LDRR’s rights.⁴

LDRR further claims that under the 50/50 Line Agreement which implemented the Term Sheet, only former SPT branches that were then controlled by UP were subject to the access rights. The Lockport Branch, according to LDRR, was then in control by LDRR and not UP. The 50/50 Line Agreement makes no such distinction, and LDRR simply had a non-exclusive lease of the Lockport Branch. Contrary to LDRR’s suggestion, UP had the right to provide direct service over the Lockport Branch, and UP had the right to grant trackage rights to third parties. Thus, it was UP, and not LDRR, that controlled the Lockport Branch.⁵

Even if the 1992 Lease Agreement granted LDRR exclusive rights to operate over the

³ The 1992 Lease Agreement is attached as Exhibit A to UP’s filing dated February 9, 2012 in the UP Abandonment Proceeding.

⁴ LDRR, of course, no longer has any rights over the Abandonment Segment.

⁵ Furthermore, the 50/50 Line Agreement provides access rights to BNSF over former STP branches “*owned or controlled*” by UP. It is undisputed that at the time of the execution of the 50/50 Line Agreement UP owned and still owns the Lockport Branch.

Lockport Branch (which it did not), the 1992 Lease Agreement expired on December 31, 2011. See Section 2 of the 1992 Lease Agreement. By letter agreement dated December 21, 2011, UP agreed to extend the term of the 1992 Lease Agreement until March 31, 2012.⁶ It appears, however, that LDRR never obtained Board approval of the extension of the lease. See 49 C.F.R. § 1180.2(d)(4).

In any event, that extension expired on March 31, 2012, and there is no evidence of record in this proceeding or in the UP Abandonment Proceeding that a further extension was granted by UP or that a new lease was entered into. Also, it does not appear that LDRR ever obtained Board approval for an extension of the 1992 lease or for a new lease with UP. Yet, LDRR comes before the Board and challenges BNSF's rights to operate over the Lockport Branch when its own rights to operate over the Retained Segment are legally suspect.

LDRR further argues that BNSF's notice of exemption is defective because BNSF did not submit a trackage rights agreement between BNSF and LDRR for the Retained Segment. The problem with LDRR's logic is twofold. First, even before its 1992 Lease Agreement expired, LDRR did not have the right to grant a third party access to the Lockport Branch. Second, BNSF did submit a trackage rights agreement between BNSF and UP, the owner of the Lockport Branch and, thus, the proper party to grant trackage rights.⁷

⁶ The letter agreement is attached as Exhibit B to UP's filing dated February 9, 2012 in the UP Abandonment Proceeding.

⁷ LDRR also complains that BNSF did not serve a copy of its notice of exemption on LDRR. There is no such requirement under the applicable Board rules. In any event, LDRR was fully aware of BNSF's filing.

Next, LDRR refers the Board to the March 2002 Restated and Amended Agreement.⁸ Specifically, LDRR cites to Section 5(a) and claims that, while that Agreement granted BNSF trackage rights over a number of rail lines, it did not grant BNSF rights over the Lockport Branch. BNSF's right to operate direct train service on the Lockport Branch is, however, granted by the Term Sheet Agreement and the 50/50 Line Agreement, not the Restated and Amended Settlement Agreement.

Finally, LDRR argues that the "notice of exemption procedures are only for routine and non-controversial cases...." Petition at 8. But this is the same tired argument made by UP and soundly rejected by the Board. There is nothing controversial in this proceeding. 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).

There is at least one potential customer that is still interested in locating adjacent to the Abandonment Segment. UP and LDRR have discontinued their respective operations over the Abandonment Segment and are no longer interested in providing rail service over that segment. Nevertheless, LDRR has made a delayed attempt to prevent BNSF from exercising its trackage rights and serving customers along the Lockport Branch. The Board should not allow this behavior and, if its request is not rejected, the Board should deny LDRR's request for reconsideration.

⁸ The March 2002 Restated and Amended Agreement is attached as Exhibit F to UP's filing dated February 9, 2012 in the UP Abandonment Proceeding.

IV. CONCLUSION

BNSF respectfully urges the Board to deny LDRR's Petition to Intervene on grounds that there is no pending proceeding in which to intervene. BNSF also urges the Board to reject, or alternatively deny, LDRR's Request for Reconsideration. BNSF's rights over the Lockport Branch will be settled by negotiation or arbitration, as the Board suggested in the June 19 Decision. Finally, BNSF urges the Board to dispose of LDRR's Petition to Intervene and Request for Reconsideration as expeditiously as possible.

Respectfully submitted,



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Dated: July 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2013, 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.



Karl Morell