

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34255

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

✓ Finance Docket No. 34304

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY--TRACKAGE RIGHTS EXEMPTION--
THE PORTLAND & WESTERN RAILROAD COMPANY--
BUSH, OR TO ALBANY, OR

PETITION FOR STAY OF EXEMPTIONS ^{*/}

ENTERED
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DEC 23 2002

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Public Record

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

December 23, 2002

Attorney for John D. Fitzgerald

*/ Expedited handling is requested, for both exemptions are otherwise to become effective at 12:01 AM, Friday, December 27, 2002.

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34255

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

Finance Docket No. 34304

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY--TRackage RIGHTS EXEMPTION--
THE PORTLAND & WESTERN RAILROAD COMPANY--
BUSH, OR TO ALBANY, OR

PETITION FOR STAY OF EXEMPTIONS

Preliminary Statement

John D. Fitzgerald,1/ for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), petitions the Surface Transportation Board (Board) that it stay the operation of the 7-day Notice of Exemption (Notice-PNWR), filed December 6, 2002, pursuant to 49 CFR §1150.41, by Portland & Western Railroad, Inc. (PNWR) in Finance Docket No. 34255 (PNWR-Lease & Operate-BNSF), and that it stay the operation of the 7-day notice of Exemption (Notice-BNSF), filed December 20, 2002, pursuant to 49 CFR §1180.2(d), by The Burlington Northern and

1/ General Chairman for United Transportation Union (UTU), on lines of The Burlington Northern and Santa Fe Railway Company (BNSF), with offices at 400 E. Evergreen Blvd., Vancouver, WA 98660.

Santa Fe Railway Company (BNSF) in Finance Docket No. 34304 (BNSF-Trackage Rights-Bush/Albany), if Notice-PNWR is not stayed.

Unless stayed, both exemptions will otherwise become effective at 12:01 AM, Friday, December 27, 2002.

The Notice-PNWR was published to become effective December 13, 2002, but the Board's December 12, 2002 decision (Decision, 12/12/02) clarified the effective date as December 27, 2002, owing to the minimum 60-days notice period to employees required by 49 CFR §1150.42(e); PNWR had filed its employee notice on October 28, 2002. (Decision, 12/12/02, 2).

The Notice-BNSF was published to become effective December 27, 2002. BNSF states it is filing a motion (today) to dismiss its notice, arguing that its proposed transaction does not require prior approval or exemption. (Notice-BNSF, 2-3 n.1).

A stay is necessary pending receipt of discovery materials in PNWR-Lease & Operate-BNSF, with an adequate opportunity to fully address all stay of exemption issues, and an opportunity to submit a petition to reject Notice-PNWR and/or to revoke the exemption; if the Board stays the operation of the exemption in PNWR-Lease & Operate-BNSF, a stay would be unnecessary at this time for BNSF-Trackage Rights-PNWR-Bush/Albany, inasmuch as PNWR would not be able to grant trackage rights over a line which remains operated by BNSF, and BNSF would need no authority to operate over its own line in that situation. However, denial of a stay in PNWR-Lease & Operate-BNSF would require a stay for BNSF-Trackage Rights-PNWR-Bush/Albany in order to protect the integrity of on-going negotia-

tions between BNSF and UTU/GO-386 pursuant to the N&W Trackage employee conditions.^{2/}

Background

The Notice-PNWR is for PNWR to lease and operate BNSF's line between Quinaby-Salem-Albany-Eugene, OR, a distance of approximately 76.75 miles, with PNWR to grant back "incidental" trackage rights to BNSF for BNSF to operate over the PNWR line between Bush (Salem) and Albany, a distance of 27.9 miles; and PNWR also would grant trackage rights over the BNSF line to Central Oregon & Pacific Railroad, Inc. (CORP), between Albany and Eugene, OR, a distance of 45 miles. PNWR certified that projected revenues as a result of the transaction would not result in the creation of a Class II or Class I carrier. (Notice-PNWR 3, 4). Nevertheless, the transaction is very substantial. PNWR and BNSF both announced that some 20,000 carloads of traffic will be diverted to PNWR. (J.D. Fitzgerald, Appendix 2, Appendix 3). UTU estimates at least 40 BNSF jobs will be lost, and many more adversely affected. (J.D. Fitzgerald, V.S. 4 & Appendix 1).

Prior to the December 6, 2002, filing of Notice-PNWR, PNWR previously on October 28, 2002, had filed its "Notice of Intent to Employees of The Burlington Northern and Santa Fe Railway Company" (Employee Notice), pursuant to 49 CFR §1150.42(e), with respect to the PNWR-BNSF lease. An estimated 15 persons would be employee by PNWR. The Employee Notice did not mention PNWR operation of the line; nor did the Employee Notice mention BNSF or CORP trackage

^{2/} Norfolk and Western Ry. Co.-Trackage Rights-BN, 354 I.C.C. 605 (1978), mod. Mendocino Coast Ry., Inc.-Lease and Operate, 360 I.C.C. 653 (1980).

rights. A copy of the 3-page Employee Notice is attached as Exhibit 1.

PNWR on November 21, 2002, filed its "Notice of Intent" to file an exemption notice pursuant to 49 CFR §1150.41. Notice-PNWR, Ex. B). The "Notice of Intent" expanded upon the earlier October 28, 2002 Employee Notice to advise that PNWR would "operate" as well as "lease" the BNSF line, and, of particular importance, PNWR also advised that BNSF would have trackage rights over the northern segment (Bush-Albany) of the line, and that CORP would have trackage rights over the southern segment (Albany-Eugene) of the line.

UTU/GO-386 after receiving the October 28, 2002 Employee Notice, made a discovery request for a copy of the PNWR-BNSF lease agreement. PNWR on November 8, 2002 (received November 12) refused to furnish a copy of the lease agreement. (Motion to Compel, 11/22/02, Appendix 1). UTU/GO-386 on November 22, 2002, made a supplemental discovery request to examine the BNSF and CORP trackage rights first mentioned in the November 21, 2002 "Notice of Intent." (Pet. for Stay, 12/11/02, Exhibit 2). PNWR on December 12, 2002, filed its opposition to both discovery requests, but sought a protective order if discovery is granted.

The Board on December 12, 2002, ruled the UTU/GO-386 petition for stay was premature, in light of the December 27, 2002 effective date for the exemption, but granted the motion to compel, subject to a future Board decision concerning a protective order.

The Board on December 16, 2002, issued its decision on a protective order. The Board's order is sweeping in scope. However, counsel was not served with the lease agreement until December 18,

2002. The PNWR-BNSF lease agreement is treated in toto entirely as a "highly confidential" document; in addition, all of the financial terms are redacted from even the highly confidential copy. PNWR requested UTU/GO-386 to advise if there is a need to see the redacted information, which presumably would be given further consideration by PNWR. The PNWR December 17, 2002 transmittal is Exhibit 2.

PNWR on December 20, 2002, by letter to the Board, advised that (1) PNWR "acknowledges" that the exemption will not be effective until December 27, (2) PNWR withdraws the request that the PNWR-CORP trackage rights agreement be approved as incidental to the transaction, stating that if and when the "parties" sign a trackage rights agreement, it will be the subject of a separate filing, and (3) PNWR and BNSF believe the BNSF trackage rights should be considered "incidental," but that BNSF will file a separate exemption notice, perhaps accompanied by a motion to dismiss. The PNWR December 20 communication is Exhibit 3.

In short, PNWR has significantly altered its proposal, so as to eliminate the CORP and BNSF "incidental" trackage rights, while BNSF will have the opportunity to press the issue on motion to dismiss in BNSF-Trackage Rights-PNWR-Bush/Albany.

Also on December 20, 2002, at approximately 4:55 PM, BNSF filed Notice-BNSF for trackage rights between Bush and Albany, Finance Docket No. 34304, BNSF-Trackage Rights-PNWR-Bush/Albany. BNSF stated it would file a motion to dismiss December 23, 2002, on the ground its trackage rights constituted a "reservation" of trackage rights resulting in the transfer of less than its entire interest in the line to PNWR, citing Finance Docket No. 33315, et

al., Minnesota Northern Railroad, Inc.-Exemption-Acquisition and Operation and Incidental Trackage Rights From Burlington Northern Railroad Company, 4 (served Aug. 14, 1997) (Minnesota Northern); in the alternative, BNSF argues the rights are "incidental" to facilitate interchange between PNWR and BNSF. BNSF-Trackage Rights-PNWR-Bush/Albany, 12/20/02, 2-3 n. 1. BNSF states that operations will begin December 27, 2002. (ibid., 4):

Consummation of the transaction will occur on the effective date of the Lease exemption (scheduled December 27, 2002), and operations under this exemption will begin on that date.

REASONS FOR STAY

The Board should stay the operation of the exemptions for the following reasons, among others:

1. False or Misleading Information.

A. PNWR. PNWR did not give 60 days notice for what have turned out to be key elements of the transaction. Such failure, combined with the inadequate and untimely response to discovery, requires. The October 28, 2002 Employee Notice did not specify that PNWR would "operate" the BNSF lines, and did not disclose trackage rights for BNSF and for CORP, which trackage rights involve the preponderance of the mileage.

It appears that the railroad industry does not take the 60-days notice seriously. The Board, on an almost weekly basis, is requested to grant waivers from the advance time requirements for

the employee notice, 49 CFR 1150.42(e).^{3/} Here, the Board in its December 12, 2002 decision, has corrected the timeliness requirement for Notice-PNWR however, PNWR has frustrated the effect of the Employee Notice requirement by willfully failing to disclose the true scope of the proposed transaction.

We believe the carrier must serve a true and correct notice, at least 60 days in advance, for all material line transfers and trackage arrangements which may affect the present and future employee opportunities. PNWR did not give that notice until November 21, 2002, such that the full 60-day period of 42(e) runs to January 20, 2003. Employees have been injured by the false PNWR October 28 notice, because this is a complicated transaction which requires the full 60-days. Moreover, PNWR's failure to respond to timely discovery, and failure to carry out the Board's December 16, 2002 discovery order in good faith, emphasizes the injury caused by giving less than 60 days notice of the true transaction.

B. BNSF. BNSF in its Notice-BNSF, filed December 20, 2002, and circulated among some BNSF employees over the weekend, has caused uncertainty and anxiety. BNSF asserts the operations will begin on December 27, 2002, under Notice-BNSF, when the Notice-PNWR becomes effective on December 27, 2002, supra 6-7.

BNSF's statement in this regard is false. The PNWR-BNSF trackage rights agreement, attached to Notice-BNSF, clearly indicates the trackage agreement becomes effective January 1,

^{3/} For example, two waiver requests were granted on December 20, 2002. Finance Docket No. 34285, Wisconsin & Southern Railroad Co.-Acquisition Exemption-Soo Line Railroad Company D/B/A Canadian Pacific Railway; Finance Docket No. 34286, Fort Worth and Western Railroad Company, Inc.-Acquisition and Operation Exemption-Union Pacific Railroad Company.

2003.⁴/ Moreover, Exhibit 4 hereto is the cover page for the PNWR-BNSF lease, indicating it becomes effective January 1, 2002.

2. PNWR and BNSF Violate the Employee Notice Provisions.

The false information presented by PNWR until November 21, 2002 regarding the scope of the transaction, described above, violates the employee notice provisions of 49 CFR 1150.42(e), inasmuch as the lines to be transferred and operated are not fully identified, at least 60 days in advance; and the false information disseminated by BNSF as to the date the trackage rights could commence, violates the N&W Trackage protective conditions, and is fraudulent based on the agreement itself. These violations are not cured by PNWR's "withdrawal" of trackage rights for CORP, for this is obviously a litigation strategy of "temporary" withdrawal engineered by BNSF; and withdrawal of the "incidental" BNSF trackage rights, in favor of a separate Notice-BNSF, does not remove BNSF trackage rights from the "transaction." It frequently occurs that a large transaction will have many facets, some of which require separate approvals, and subordinate exemption notices, and some being outside Board regulation altogether. This is common in merger proceedings, but is also true for lesser transactions. See: CSX Corp. Et Al.-Control-Conrail Inc. Et Al., 3 S.T.B. 196 (1998); Orange County Transp.-Exempt.-Atchison, T. & SF. Ry. Co., 10 I.C.C.2d 78 1994).

3. Stay is Required to File Petition to Revoke. A stay is required to provide an opportunity for protestant to prepare

⁴/ The PNWR-BNSF trackage rights agreement is Exhibit C to the "highly confidential" PNWR-BNSF lease. BNSF and PNWR by their action have removed the confidentiality embargo in all respects.

and file a petition to reject or revoke. PNWR has not provided information in a timely manner--60 days in advance. Moreover, the "highly confidential" label on the lease agreement prohibits counsel from meaningful discussions with persons represented by UTU/GO-386, even apart from the redacted financial terms.

Protestant is filing 11 copies of the redacted lease agreement under seal, as its Exhibit 5.

4. Stay is Required for Effective Labor Negotiations.

The verified statement of J.D. Fitzgerald indicates that BNSF has served a conditional N&W Trackage, Section 4, notice upon employee representatives. Conference is anticipated. There is a 30-day status quo provision which runs to January 12, 2002. A stay is necessary to carry out the Board's employee conditions for BNSF trackage rights. A stay of the exemption in F.D. No. 34255 would assist sound labor relations in continuing UTU-BNSF negotiations, along with the Board sustaining the validity of BNSF's exemption notice in F.D. No. 34304.

Failure to grant a stay threatens fair wages and safe and suitable working conditions, contrary to 49 U.S.C. 10101(11), along with other efficiency, safety, and economical goals of the rail transportation policy, 49 U.S.C. 10101(3), (4), (5), (8), (9).

5. Jurisdiction of the Board. A stay is required to protect the effective jurisdiction of the Board over the transaction. Here, PNWR proposes to have the exemption take effect December 27, but with operations to commence January 1, 2002, according to the terms of the lease (Exhibit 4), and the PNWR-BNSF trackage rights agreement. (Notice-BNSF, Ex. 2). PNWR, once the

exemption becomes effective, could take certain actions under the exemption which may prejudice or delay the ultimate resolution of issues by the Board. Typically, where a noticing carrier makes a statement postponing operations under the notice, the Board will issue a "housekeeping" stay in support of the Board's own jurisdiction, and to keep the carrier to its word. A recent example is F.D. No. 34177, Iowa, Chicago & Eastern Railroad Corporation-Acquisition an Operation Exemption-Lines of I&M Rail Link, LLC (served June 26, 2002). The Board's power to preserve its effective jurisdiction in similar to that of a court under the All Writs Act, 28 U.S.C. 1651. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); Application of President & Directors of Georgetown Col., 331 F.2d 1000, 1004-6 (D.C. Cir. 1964).

6. Traditional Stay Requirements. The traditional requirements for a stay are satisfied here. UTU/GO-386 has a high probability of success on its claim the transaction comes under 49 U.S.C. 11323(a)(6) as a joint use arrangement, rather than as a line acquisition under 49 U.S.C. 10902. UTU/GO-386 intends to promptly file a petition to reject/revoke when it is able to freely converse with BNSF employees regarding the contents of the "highly confidential" provisions of the lease agreement, with counsel able to examine the financial terms of the agreement. UTU/GO-386 considers examination of the lease to be important. (J.D. Fitzgerald, V.S. 4-5).

It is clear that the line upgrading provisions of lease agreement are a strong indicator that a "joint use" arrangement is involved. The substantial 20-miles for which BNSF will provide the rail for upgrading the line with PNWR, is situated entirely south

of Albany, and not on the track segment over which BNSF proposes to operate under trackage rights. The BNSF trackage rights are north of Albany. (J.D. Fitzgerald, V.S. 5-6). Accordingly, BNSF is to make substantial expenditures over a line which it will not operate--a clear example of a transaction for joint use under 49 U.S.C. 11323(a)(6).

Protestant expects other examples of "joint use" will be made known when the lease conditions are known to BNSF employees.

The matter of protestant's success on the merits concerning BNSF's recent fling in F.D. No. 34304 cannot be resolved until BNSF files its motion to dismiss BNSF-Notice. The Board's initial view challenging the notion of "incidental" trackage rights is valid. The only citation advanced by BNSF in Notice-BNSF is Minnesota Northern, supra, which clearly is not in point. The text of Minnesota Northern is attached hereto as Exhibit 6. This is not a situation where BNSF "retained" trackage rights by transferring less than its entire interest in the line to PNWR, retaining trackage rights for itself. Minnesota Northern, supra, 4 final para. (Appendix 6). Of course, protestant will supplement its arguments after it is given an opportunity to review BNSF's forthcoming motion to dismiss. BNSF's delay in filing Notice-BNSF, and delay in filing its motion, are strong arguments for a stay.

The Albany interchange is not the exclusive point of interchange between BNSF and PNWR. Interchange also can occur at Bush or Minto for traffic moving over the line between Bush and Albany. (J.D. Fitzgerald, V.S. 6-7). Moreover, there is the matter of Albany & Eastern Railroad Company at Albany.

Protestant believes it will prevail in sustaining the Board's jurisdiction over the Notice-BNSF.

Railroad employees would suffer irreparable injury if the exemptions become effective, whether on December 27, 2002, or on January 1, January 12, or January 20, 2003. This is evidenced by the verified statement of John D. Fitzgerald.

PNWR and BNSF will not be injured by a stay. The lease agreement and trackage rights agreements are published for January 1, 2002, with a valid employee 60-day notice period not expiring until January 20, and the N&W Trackage status quo period running to January 12, 2002. (J.D. Fitzgerald, V.S. 3).

The public interest warrants a stay so that there may be an orderly resolution of certain matters, and an opportunity to file a petition to reject/revoke.

7. Discovery. The Board should eliminate the "highly confidential" classification for the redacted lease agreement. (Exhibit 5), and permit UTU/GO-386 to examine the redacted material under a "highly confidential" standard. Protestant believes the Board intended such in its December 16, 2002 decision. The rush of events and shortness of time did not permit raising objections to PNWR's pathetic December 18, 2002 transmittal before now.

CONCLUSION

The Board should stay the operation of the notice of exemption in Finance Docket No. 34255, and the notice of exemption in F.D. No. 34304 if such becomes necessary, pending resolution of discovery matters, pending opportunity to respond to BNSF's motion

in F.D. No. 34304, and pending disposition of the UTU/GO-386 petition to reject/revoke, or until further order of the Board.

Respectfully submitted,


GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

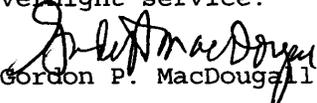
December 23, 2002

Attorney for John D. Fitzgerald

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage prepaid, with telephone advice and opportunity for overnight service.

Washington DC


Gordon P. MacDougall

206516



Before the

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34255

ENTERED
Office of Proceedings

OCT 30 2002

Part of
Public Record

**PORTLAND & WESTERN RAILROAD, INC.
- LEASE AND OPERATION EXEMPTION -
THE BURLINGTON NORTHERN AND SANTE FE RAILWAY COMPANY**

**NOTICE OF INTENT DIRECTED TO EMPLOYEES OF
THE BURLINGTON NORTHERN AND SANTE FE RAILWAY COMPANY**

Pursuant to the regulations of the Surface Transportation Board (the "Board") at 49 CFR §1150.42(e), Portland & Western Railroad, Inc. ("PNWR") hereby gives notice of its intent to lease from The Burlington Northern and Santa Fe Railway Company ("BNSF"), the 76.75 mile line of railroad between milepost 64.70 between Quinaby and Salem, Oregon and milepost 141.45 near Eugene, Oregon. The lease is intended to be effective as of December 27, 2002.

EXHIBIT 1
Page 1 of 3

As a result of the transaction, PNWR preliminarily estimates that following jobs will be available at the starting hourly rates of pay (depending on experience) indicated:

<u>Jobs</u>	<u>Range of Starting Rates of Pay</u>
4 Locomotive Engineers	\$ 11.48 - 13.75
4 Conductors	\$ 11.48 - 13.75
1 Machinist	\$ 11.48 - 13.75
1 Signal Maintainer	\$ 13.28 - 14.75
1 Carman	\$ 11.48 - 13.75
1 Customer Service/RMI Input	\$ 12.38 - 14.75
3 Maintenance of Way Laborers	\$ 11.48 - 13.75

Employees will be provided with Railroad Retirement, medical insurance, holidays, vacation and other benefits consistent with the benefits currently provided employees of PNWR with similar jobs.

PNWR is an equal opportunity employer. Employees will be selected based upon their experience and suitability for the jobs that may be offered. Successful applicants will be required to pass a pre-employment drug and alcohol screen, complete a medical questionnaire, and take a physical exam.

Applications for employment should be made by sending a letter and resume stating the applicant's experience, providing references for any employment held during the last five years and any rail industry employment held at any time. The applicant must be available to start work by the seventh day before the effective date of the lease. The letter should be sent by regular mail to Roberta Kane, Manager of Human Resources at 650 Hawthorne Avenue SE, Suite 220, Salem, OR 97301.

PORTLAND & WESTERN RAILROAD, INC.

Dated: October 25, 2002

By:


Larry Phipps
President & General Manager

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GC&E GOLLATZ
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ERIC M. HOCKY
DIRECT DIAL 610.350.4129
emhocky@ggelaw.com

December 17, 2002
VIA: FEDEX

Gordon P. MacDougall, Esq.
1025 Connecticut Ave. NW
Washington, D.C. 20036

Re: STB Finance Docket No. 34255
Portland & Western Railroad, Inc. -- Lease and Operation Exemption --
The Burlington Northern and Santa Fe Railway Company

Dear Gordon:

I am in receipt of your signed Highly Confidential Undertaking. Pursuant to the Board's order issued December 16, 2002, and the Highly Confidential Undertaking, enclosed is a copy of the lease agreement with exhibits, including the trackage rights agreements.

Although the Board did not directly address our request to redact the financial terms of the lease, the copy we are sending you has that information redacted. If, after reviewing the lease you believe you need to see the redacted information, please call me.

Very truly yours,

Eric M. Hocky, mjr

Eric M. Hocky

Enclosure

EMH/e

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EXHIBIT 2
Page 1 of 1

GOLLATZ, GRIFFIN & EWING, P.C.

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December 19, 2002
BY FEDEX

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Mercury Building, #711
1925 K Street, N.W.
Washington, DC 20423-0001

RE: STB Finance Docket No. 34255
Portland & Western Railroad, Inc.
-- Lease and Operation Exemption --
The Burlington Northern and Sante Fe Railway Company

Dear Secretary Williams:

In response to the decision of Chairman Nober served December 12, 2002, Portland & Western Railroad, Inc. ("PNWR") is filing this letter as clarification to its exemption notice filed on December 6, 2002:

- (a) PNWR acknowledges that the exemption will not be effective until December 27, 2002.
- (b) PNWR withdraws the request that the proposed trackage rights agreement with CORP be approved as incidental to this transaction. No agreement has been signed between PNWR and CORP, and the trackage rights do not need to be effective together with the lease exemption. If and when the parties sign a trackage rights agreement, it will be the subject of a separate filing.
- (c) PNWR and BNSF believe that the trackage rights BNSF is retaining are an integral part of the transaction and should be considered "incidental" to the lease transaction. However, so as not to delay the effectiveness of the lease exemption, BNSF will file a separate exemption notice with respect to the trackage rights. (BNSF may also file a motion to dismiss on the grounds that a separate notice was not required.)

PNWR is filing the original and ten (10) copies of this letter so that it may be filed of record in this proceeding.

EXHIBIT 3

GOLLATZ, GRIFFIN & EWING, P.C. Page 1 of 2

WEST CHESTER

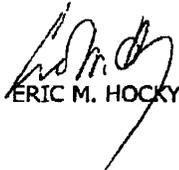
PHILADELPHIA

WILMINGTON

Hon. Vernon A. Williams
December 19, 2002
Page 2 of 3

Please time stamp the extra copy of this letter provided with the original and return it to me in the stamped self-addressed envelope provided for your convenience.

Respectfully,



ERIC M. HOCKY

cc by FedEx:

Sarah J. Bailliff, Esq.
Gordon P. MacDougall, Esq.
Thomas F. McFarland, Esq.

cc by mail:

All persons on the attached service list

EXHIBIT 3
GOLLATZ, GRIFFIN & EWING, P.C.
Page 2 of 2

WEST CHESTER

PHILADELPHIA

WILMINGTON

[redacted] - redactions

AGREEMENT FOR LEASE AND TRANSFER OF
CERTAIN ASSETS, RIGHTS AND OBLIGATIONS
OF
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
TO
THE PORTLAND & WESTERN RAILROAD, INC

EXECUTED AS OF October 15, 2002
EFFECTIVE JANUARY 1, 2003 THROUGH December 31, 2017

STB FINANCE DOCKET NO. 34255
LEASE AGREEMENT
HIGHLY CONFIDENTIAL MATERIALS
SUBJECT TO PROTECTIVE ORDER

CONFIDENTIAL

PNWR-BNSF LEASE AGREEMENT

EXHIBIT 5

25435
EB

SERVICE DATE - AUGUST 14, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33315¹

MINNESOTA NORTHERN RAILROAD, INC.--EXEMPTION--
ACQUISITION AND OPERATION OF RAIL LINE AND INCIDENTAL
TRACKAGE RIGHTS FROM BURLINGTON NORTHERN RAILROAD COMPANY

STB Finance Docket No. 33316

RAILAMERICA, INC.--CONTINUANCE IN CONTROL
EXEMPTION--MINNESOTA NORTHERN RAILROAD, INC.

STB Finance Docket No. 33337

MINNESOTA NORTHERN RAILROAD, INC.--TRACKAGE RIGHTS--THE
BURLINGTON NORTHERN AND SANTA FE RAILROAD COMPANY

Decided: August 5, 1997

This decision rules on petitions filed by John D. Fitzgerald, for and on behalf of United Transportation Union-General Committee of Adjustments for certain lines of the Burlington Northern Railroad Company (UTU-GCA), to reject notices of exemption or to revoke the exemptions in three related proceedings. We will deny each of UTU-GCA's petitions.

BACKGROUND

1. *STB Finance Docket Nos. 33315 and 33316.* On December 11, 1996, in STB Finance Docket No. 33315, Minnesota Northern Railroad, Inc. (MNR) filed a notice of exemption pursuant to 49 U.S.C. 1150.31-.34 from the prior approval requirements of 49 U.S.C. 10901 to acquire and operate a total of about 204.10 miles of rail line of what is now The Burlington Northern and Santa Fe Railway Company (BNSF).² The acquisition involved five separate lines of track.³ On the same date, in STB Finance Docket No. 33316, RailAmerica, Inc. (RailAmerica)

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² On December 31, 1996, The Atchison, Topeka, and Santa Fe Railway Company (ATSF) merged with and into Burlington Northern Railroad Company (BN). The name of the surviving corporation is The Burlington Northern and Santa Fe Railway Company. In this decision, we will refer to this entity as BNSF, except where the context requires us to refer to BN.

³ The transaction in STB Finance Docket No. 33315 specifically provided for MNR to acquire the following rail lines from BNSF: (1) 33.25 miles of rail line on the MN Junction at Ada, MN, between Ada Subdivision mileposts 80.25 and 47.0; (2) 20.6 miles of rail line on the Redland Junction at Fertile, MN, between Fertile Subdivision mileposts 65.7 and 45.1; (3) 13.0 miles of rail line on the Tilden Junction at Red Lake Falls, MN, between Grand Forks Subdivision mileposts 56.84 and 13.0 miles east; (4) 44.25 miles of rail line on the MN Junction at Perley, MN, between P Line Subdivision mileposts 65.25 and 21.0; and (5) 93 miles of rail line on the St. Hilaire line at Warroad, MN, between Warroad Subdivision mileposts 11.0 and

(continued...)

filed a notice of exemption under 49 CFR 1180.2(d)(2) and 1180.4(g) from the prior approval requirements of 49 U.S.C. 11323 to continue in control of MNR upon MNR's becoming a Class III rail carrier.⁴ In compliance with 49 CFR 1180.2(d)(2), RailAmerica stated that: (1) MNR does not connect with any other railroads in RailAmerica's corporate family; (2) the continuance in control is not part of a series of anticipated transactions that would connect MNR with any other railroad in its corporate family; and (3) the transaction does not involve a Class I carrier.

On December 16, 1996, UTU-GCA filed a petition to reject the notices of exemption or revoke the exemptions in STB Finance Docket Nos. 33315 and 33316. UTU-GCA sought rejection of the notices on the grounds that they did not indicate the date of consummation of the transactions with the specificity required under 49 CFR 1150.33(e)(2). UTU-GCA also argued that the notice in STB Finance Docket No. 33315 did not include adequate information on incidental trackage rights over BNSF. Petitioner further argued that a failure to set out the incidental trackage rights over BNSF also impaired the validity of the notice in STB Finance Docket No. 33316 because MNR and other rail carriers owned or controlled by RailAmerica might arguably connect through the incidental trackage rights, thus making the transaction ineligible for the class exemption. Alternatively, UTU-GCA argued that the exemptions should be revoked due to MNR's alleged failure to comply with Board rules and regulations.

To accommodate the concerns expressed by UTU-GCA, MNR and RailAmerica withdrew the notices in both STB Finance Docket Nos. 33315 and 33316 and filed amended notices of exemption on December 20, 1996; the notices included a discussion of the incidental trackage rights involved, as well as a date for consummation of the acquisition.

On December 24, 1996, UTU-GCA filed a supplemental petition to reject/revoke in both proceedings.⁵ In support of rejection, UTU-GCA argued that total route miles were not accurately calculated, that the subject lines and related trackage rights were not competently described, and that a map required by 49 CFR 1150.33(f) was not included in the filing. UTU-GCA also maintained that the consummation date provided in the amended notices was still not specific enough, and that the "reverse" overhead trackage rights granted to BNSF did not qualify for incidental trackage rights under 49 U.S.C. 10901 and might provide the basis for an

³(...continued)

104.0.

Concurrent with the above transaction, MNR was to acquire incidental overhead trackage rights for the sole purposes of: (1) interchanging rail freight cars and equipment between MNR and BNSF at BNSF's Crookston, MN, rail yard only; and (2) moving locomotives, cars and equipment between the rail lines over BNSF's Grand Forks Subdivision rail line between milepost 81.5 west of Crookston, and milepost 31.0 at Erskine, MN, and also over all yard tracks in BNSF's Crookston rail yard. In addition, MNR would acquire BNSF's trackage rights to operate over the Soo Line Railroad Company between milepost 273.0 at or near Erskine and milepost 309.5 at or near Thief River Falls, MN. BNSF would retain overhead trackage rights only, without serving any industries on the line, to provide rail freight service over the Perley line, between P Line Subdivision milepost 65.25 and milepost 21.0.

⁴ RailAmerica controls MNR, a corporation newly formed for the purpose of acquiring and operating BNSF rail lines in Minnesota and a noncarrier until it acquired the lines. RailAmerica controls 10 Class III railroads in addition to MNR: Evansville Terminal Company, Inc.; Huron & Eastern Railway Company, Inc.; Saginaw Valley Railway Company, Inc.; West Texas & Lubbock Railroad Company, Inc.; Plainview Terminal Company; Dakota Rail, Inc.; South Central Tennessee Railroad Company; Cascade and Columbia River Railroad Company; Gettysburg Railway Company; and Otter Tail Valley Railroad (Otter Tail).

⁵ UTU-GCA also filed a petition to stay the effective date of the exemption in STB Finance Docket Nos. 33315 and 33316. However, the stay requests were filed too close to the consummation date for them to be acted upon.

improper haulage arrangement between MNR and an affiliate. Finally, UTU-GCA contended that revocation was warranted here because MNR and BNSF failed to include an additional .41-mile line segment of trackage rights between Crookston and Erskine in STB Finance Docket No. 33315, which omission would allegedly cause operating problems contrary to rail transportation policy (RTP) goals. MNR and RailAmerica replied. The transactions in STB Finance Docket Nos. 33315 and 33316 were consummated on December 27, 1996.

On January 13, 1997, UTU-GCA filed a second supplemental petition to revoke in STB Finance Docket No. 33315. In the petition, UTU-GCA argued that, because it appeared that BNSF would retain dispatching control over these operations, depending on the degree of BNSF's control over MNR, the transaction could be subject to 49 U.S.C. 11323 (and thus to labor protection under 49 U.S.C. 11326). UTU-GCA also argued that there was a "causal connection" between this transaction and the 1995 merger between BN and ATSF and that labor protective conditions imposed in the merger should be applied here. MNR and BNSF replied separately to UTU-GCA's petition.⁶ The notices of exemption in STB Finance Docket Nos. 33315 and 33316 were served and published in the *Federal Register* on March 12, 1997.

2. *STB Finance Docket No. 33337.* On January 8, 1997, MNR and BNSF filed a notice of exemption to cover overhead trackage rights between mileposts 31.0 and 33.0 near Erskine, MN, to supplement the incidental trackage rights that were part of the transaction in STB Finance Docket No. 33315, and to provide for more efficient operations by MNR.⁷ On January 13, 1997, UTU-GCA filed a petition to reject the notice or to revoke the exemption.⁸ UTU-GCA sought rejection on the grounds that BNSF was not an operating carrier and MNR could not be accorded trackage rights over a noncarrier through the trackage rights class exemption; that MNR's map did not comply with the applicable regulations; and that MNR did not file a publicly available copy of the trackage rights agreement with its notice. UTU-GCA also argued that, if the notice was not rejected, the exemption should be revoked because the "mysteries" of the three related transactions require more than the 7-day notice under the class exemption procedures. MNR replied. This notice of exemption was also served and published in the *Federal Register* on March 12, 1997 (the March decision).

DISCUSSION AND CONCLUSIONS

1. *STB Finance Docket Nos. 33315 and 33316.* As stated, UTU-GCA has filed petitions either to reject the notices or to revoke the exemptions in these two proceedings.

Rejection - To warrant rejection of a notice of exemption, a petitioner must demonstrate that the notice contains false or misleading information.⁹ UTU-GCA argues that the description of the line acquisitions is inadequate. UTU-GCA states that the notice contained proper names for the line (such as "Redland Junction") and that UTU-GCA members were confused by these names. However, UTU-GCA does not challenge the applicability or the accuracy of the milepost descriptions, which offer a more precise description of the lines being transferred. Accordingly, we reject UTU-GCA's argument on this issue. UTU-GCA also points to an inconsistency between the notices in STB Finance Docket Nos. 33315 (total route miles listed at 204.10) and

⁶ In its response, BNSF categorically denied (1) any dispatching control over MNR's train operations; and (2) any causal connection between the rail merger and the subject acquisition/operation exemption.

⁷ MNR filed a motion for a protective order on January 9, 1997. The motion was granted over UTU-GCA's objections by decision served March 6, 1997.

⁸ UTU-GCA also filed a petition to stay the effective date of the exemption. By decision served January 14, 1997, the stay petition was denied.

⁹ Under 49 CFR 1150.32, an exemption is void *ab initio* if it contains false or misleading information.

33316 (total route miles listed at 210.10). MNR acknowledges that a typographical error does exist in STB Finance Docket No. 33316, but notes that the actual mileage was accurately described in the STB Finance Docket No. 33315 notice and that, in any event, the mileage for each of the segments was accurately described. We conclude that the typographical error in this instance is not a material error and is of minor or no consequence.

UTU-GCA also argues that the total route miles are greater than those set out in the notice in STB Finance Docket No. 33315 because the trackage rights are not included. According to UTU-GCA, these trackage rights total 108.75 miles.¹⁰ We have reviewed the amended notice filed December 20, 1996, in STB Finance Docket No. 33315. In that notice, MNR sets out the specific trackage rights, including those retained by BNSF. Although MNR does not include the trackage rights in the total route miles, we view UTU-GCA's argument about this issue as irrelevant to actual public notice. Indeed, inclusion of the mileage for trackage rights in the total number of miles to be transferred is not a requirement of section 1150.33(e)(4). In any event, UTU-GCA has apparently had little difficulty in understanding the amended notice of exemption and its implications. In fact, UTU-GCA found a valid discrepancy in that MNR lacked the necessary trackage rights (according to UTU-GCA, 0.41 miles) to properly operate the acquired lines. As a result, MNR acquired another two miles of overhead trackage rights from BNSF in STB Finance Docket No. 33337.

UTU-GCA also states that a map was not included with the publicly-filed notice. MNR responds that a map was filed with the original notice on December 11, 1996, but that a map may inadvertently have been omitted when the amended notices were filed on December 20, 1996. To remedy any deficiency, MNR filed additional copies of the map with a cover letter on January 6, 1997. As MNR points out, UTU-GCA had a map from the original filing. UTU-GCA essentially states only that the map was not included in the December 20, 1996 filing; it does not allege any injury. We believe that any error was *de minimis* and harmless.

UTU-GCA also claims that the consummation date is not shown with certainty in STB Finance Docket No. 33315 as required by the regulations. According to petitioner, the amended notice states that the transaction will be "consummated" on or about December 27, 1996, in a narrative portion of the notice while, in the formal section of the notice, MNR states that the transaction will "close" on or about December 27, 1996. UTU-GCA maintains that the "confusion" with the formal and narrative portions of the notice and the "vagueness of the Notice Caption" require a more definitive clarification to comply with the Board's requirements, and that the use of the word "close" is insufficient in itself. We are of a different view. In both the notice (page 3, paragraph c) and the narrative, MNR uses the phrase "on or about December 27, 1996" to refer to consummation. Under 49 CFR 1150.33(c), the regulations require the notice to include either a statement that an agreement has been reached or details about when one will be reached. Under 49 CFR 1150.33(e)(2), the notice must provide the "proposed time schedule for consummation of the transaction." The notice here adequately conforms to the regulations regardless of whether MNR referred to when the transaction would be "closed" or when it would be "consummated."

UTU-GCA also argues that BNSF improperly retained trackage rights here through an exemption in violation of 49 CFR 1150.31(a)(4). According to UTU-GCA, BNSF should instead have been required to convey the entire line to MNR, including all operations, and then MNR should have been required to seek Board approval in a separate transaction to grant trackage rights back to BNSF. We see nothing improper in the parties' approach here. The parties could have structured their agreement in the manner suggested by UTU-GCA but chose not to do so. BNSF has simply transferred less than its entire interest in the line to MNR, retaining certain overhead trackage rights for itself. BNSF had every right to do this. In this context, we do not view the trackage rights retained by BNSF as incidental trackage rights under

¹⁰ Our calculation of the trackage rights mileage from the notice shows a total of 127.25 miles.

section 1150.31(a)(4). Finally, we find that there has been no transfer here of any trackage rights from MNR to BNSF, incidental or otherwise, that would require Board approval.

Finally, UTU-GCA also speculates that the trackage rights might provide the basis for a "haulage" arrangement whereby RailAmerica would connect its MNR and Otter Tail lines. If so, UTU-GCA argues that these connecting lines would invalidate the notice of exemption in STB Finance Docket No. 33316. UTU-GCA has not, however, presented any evidence to support its position, and we cannot find for UTU-GCA solely on the basis of a speculative comment. In sum, we conclude that UTU-GCA has not demonstrated that these notices contain false or misleading information. Thus, we will deny UTU-GCA's request that they be rejected.

Revocation. To warrant revocation of an exemption, in whole or in part, a petitioner must show that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The party seeking to revoke the exemption has the burden of proof, and a petition to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. *CSX Transp., Inc.--Aban.--In Randolph County, WV*, 9 I.C.C.2d 447, 449 (1992).

UTU-GCA offers a number of arguments for revocation of the exemptions in STB Finance Docket Nos. 33315 and 33316. The claim most relevant to UTU-GCA's interests of job retention and labor protection is that the exemption in 33315 is not properly categorized under section 10901 (where no labor protection is available), but falls under 49 U.S.C. 11323 (under which labor protection is available through 49 U.S.C. 11326). UTU-GCA offers two arguments in support of its position. First, as indicated earlier, UTU-GCA asserts that it appears that BNSF (a Class I carrier) will retain dispatching control over MNR's operation, and that, depending on the degree of BNSF's control over MNR, this could bring the acquisition/operation transaction within 49 U.S.C. 11323.

Second, UTU-GCA asserts that the acquisition and operation exemption stems from the merger between ATSF and BN, which envisioned the elimination of "excess" lines.¹¹ UTU-GCA maintains that there is a "causal connection" between the merger and BN's sale of what UTU-GCA argues are excess lines here to MNR (UTU-GCA does not further elaborate), and argues that employees adversely affected by the transaction should be covered by the labor protective conditions imposed in the merger decision.

We conclude that neither argument has merit. As to dispatching control, we note that not only has UTU-GCA not provided any evidence in support of its claim, but that BNSF has categorically denied that it will exercise any control over any aspects of MNR's operations. We further conclude that UTU-GCA has not demonstrated any connection between the merger and the lines at issue in STB Finance Docket No. 33315 that would bring that transaction within the coverage of the merger and the labor conditions. In this regard, we note BNSF's statements to the effect that the former BN's branch lines at issue are not located near lines of the former ATSF; that no merger-related rail operating coordinations between the two former rail systems were identified in the BNSF merger application on the rail lines in issue or anywhere near them; and that no such coordinations have occurred.

In addition, UTU-GCA seeks revocation of the exemptions in STB Finance Docket Nos. 33315 and 33316 because MNR has allegedly failed to comply with the Board's regulations and because MNR has failed to include a .41-mile segment of trackage rights, the exclusion of which would make for inefficient operations contrary to the RTP. Neither of these arguments has merit. The first is an argument for rejection (that has already been discussed and found not to warrant rejection), not for revocation, and the second relates to a potential problem that has been

¹¹ *Burlington Northern Inc. and Burlington Northern R.R. Co.--Control and Merger--Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Ry. Co.*, Finance Docket No. 32549, Decision No. 38 (ICC served Aug. 23, 1995).

cured by MNR's notice in STB Finance Docket No. 33337, that covers a transaction in which BNSF has granted MNR an additional two miles of trackage rights.

In sum, we conclude that UTU-GCA has not sustained its burden of showing that reconsideration of these exemptions is warranted and regulation of the transactions is necessary. As such, we will deny UTU-GCA's request that these two exemptions be revoked.

2. *STB Finance Docket No. 33337.* MNR and BNSF filed this notice of exemption for an additional two miles of trackage rights because the notice in STB Finance Docket No. 33315 did not include all of the trackage rights necessary for an efficient operation. Unlike the petition in STB Finance Docket Nos. 33315 where the parties sought exemption from 49 U.S.C. 10901, this petition was filed for exemption from 49 U.S.C. 11323(a)(6) and applicant agreed to the imposition of labor conditions imposed in *Norfolk and Western Ry. Co.--Trackage Rights--BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate*, 360 I.C.C. 653 (1980).

Rejection. As previously stated, to warrant rejection of a notice of exemption, a petitioner must demonstrate that the notice contains false or misleading information. In its petition to reject the notice of exemption, UTU-GCA argues that BNSF is not an operating carrier. Because BNSF is, in fact, an operating carrier, UTU-GCA's allegation cannot serve as a basis for rejection. UTU-GCA also complains about the map, stating that it is confused about the extent of the trackage rights granted. However, we note that the map clearly shows the location of the rights granted and, additionally, that the involved trackage is on the identical line over which UTU-GCA suggested that BNSF convey additional trackage to MNR. Finally, UTU-GCA also contends that MNR did not file a publicly-available copy of the required trackage rights agreement. A protective order was served in this proceeding on March 6, 1997, which permits inspection of the agreement upon an undertaking to ensure that the terms remain confidential. Apparently UTU-GCA has not availed itself of the opportunity to inspect the agreement, suggesting that UTU-GCA does not believe the agreement to be of any import to its position in this proceeding. Accordingly, we need not further consider this argument, except to note that the agreement is "publicly" available, but only under certain conditions. In sum, we conclude that UTU-GCA has failed to demonstrate that the notice contains false or misleading information requiring rejection. As such, we will deny UTU-GCA's petition to reject.

Revocation. As stated, UTU-GCA also has petitioned to have this exemption revoked, along with those in the other proceedings. As previously discussed, to warrant revocation of an exemption, a petitioner must show that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. UTU-GCA maintains that, when this proceeding is considered in conjunction with STB Finance Docket Nos. 33315 and 33316, MNR's noncompliance with the exemption requirements and the "mysteries" of the three related transactions require revocation of all three exemptions and closer Board scrutiny. We have concluded, however, that such rule "violations" are grounds for rejection, not revocation, and that, in any event, MNR has substantially complied with all Board requirements in STB Finance Docket Nos. 33315, 33316, and 33337. Moreover, UTU-GCA has failed to demonstrate that there is anything improper about these three filings or that they fail to qualify for processing under the respective class exemption procedures pursuant to which they were filed. Further, it is hard to understand how employees will be injured by the transaction we authorized in STB Finance Docket No. 33337 because applicants agreed to, and we imposed, the required labor protective conditions in the March decision. Accordingly, UTU-GCA's petition to revoke the exemption in STB Finance Docket No. 33337 will be denied as well.

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

It is ordered:

1. UTU-GCA's petitions in STB Finance Docket Nos. 33315, 33316, and 33337 to reject the notices of exemption or to revoke the exemptions are denied.
2. This decision is effective on the service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

SUPPLEMENTAL VERIFIED
STATEMENT OF JOHN D. FITZGERALD

My name is John D. Fitzgerald. I am the same person of same name that previously submitted a verified statement in these proceedings, dated December 11, 2002, in support of my petition for stay in Finance Docket No. 34255. The Board on December 12 denied a stay as unnecessary at that time.

This supplemental verified statement supersedes that dated December 11, 2002, and restates the prior verified statement, along with subsequent events and information.

It is necessary for the Board to stay the December 27, 2002 effective date for the exemptions noticed in Finance Docket No. 34255 and Finance Docket No. 34304.

I serve as General Chairman for General Committee of Adjustment 386, United Transportation Union (UTU), for lines of The Burlington Northern and Santa Fe Railway Company (BNSF).

I commenced railroad service in September 1970 on Burlington Northern Railroad Company (BN), predecessor of the present BNSF, and am a Conductor. I became a UTU Local Chairman in 1975, and Assistant General Chairman in 1981. I assumed my present position as General Chairman in August 1993, a full-time elective position, which I hold today.

My railroad experience, and duties with UTU over the years, have made me fully familiar with railroad operations in the Pacific Northwest, and in the State of Oregon.

I have read the Notice of Exemption, filed December 6, 2002, by Portland & Western Railroad, Inc. (PNWR), as well as PNWR's earlier October 28, 2002 Notice to Employees, and PNWR's November 21, 2002 Notice of Intent, whereby BNSF will lease its line between Quinaby and Eugene, OR, a distance of 76.75 miles. The November 21 and December 6, 2002, notices state BNSF will cause PNWR to accord "incidental" trackage rights to Central Oregon & Pacific Railroad, Inc. (CORP) between Albany and Eugene, OR, a distance of 45 miles, and BNSF will cause PNWR to accord "incidental" trackage rights to BNSF between Albany and Salem (Bush), OR, a distance of 27.9 miles.

I have read BNSF's Notice of Exemption, in Finance Docket No. 34304, The Burlington Northern and Santa Fe Railway Company- Trackage Rights Exemption-The Portland & Western Railroad Company- Bush, OR to Albany, OR, filed December 20, 2002 (BNSF-Trackage Rights-Bush/Albany), wherein BNSF will operate over trackage which BNSF has leased to PNWR in this proceeding, between Bush (Salem) and Albany, OR, a distance of 27.9 miles. BNSF states that on December 23, 2002, it will file a motion to dismiss its notice. BNSF-Trackage Rights-Bush/Albany, 2-3 n.1.

Further, I have read the PNWR letter to the Surface Transportation Board (Board), filed December 20, 2002, that PNWR withdraws its request that the proposed trackage rights agreement with CORP be approved as "incidental" to the transaction, such that if and when the "parties" sign a trackage rights agreement, it will be the subject of a separate filing.

Finally, I have received from BNSF's labor relations officer the N&W Trackage, Section 4, notice for the BNSF-Trackage Rights-

Bush/Albany proceeding. I have responded to this notice and, along with other matters, it contains a misunderstanding of certain facts. I have requested a conference under Article I, Section 4, of N&W Trackage. I am aware that at least one other General Chairman, of another organization, has received a similar N&W Trackage Rights notice. It is my understanding that the N&W Trackage employee conditions contain a 20-day status quo provision, which I calculate would be to and including January 12, 2002. However, the BNSF labor relations notice states the notice is conditional upon the Surface Transportation Board treating the BNSF trackage rights between Salem and Albany, OR, as a separate matter, which would be consistent with a valid December 20, 2002 BNSF notice of exemption in BNSF-Trackage Rights-Bush/Albany.

I add that on December 11, 2002, I filed to intervene in Docket No. 42076, Albany & Eastern Railroad Company v. The Burlington Northern and Santa Fe Railway Company, a complaint proceeding instituted November 26, 2002 against BNSF, brought by Albany & Eastern Railroad Company (AERC), a carrier connecting at Albany, OR. Docket No. 42076 appears related to the instant PNWR-BNSF transactions involved in the instant Finance Docket Nos. 34255 and 34304.

I have been involved in many BNSF spin-off line sales. The instant 15-year PNWR-BNSF transaction, also involving CORP, is far from typical, and is most unusual. This is a large transaction which, if permitted to become effective, will adversely affect many railroad employees and their communities. Service for shippers/receivers, and for carriers connecting with BNSF will seriously deteriorate and become downgraded.

Attached as Appendix 1 is my 6-page preliminary analysis of the adverse employee and community impacts. Some 40 BNSF employees will be displaced under PNWR operation of the BNSF yards near Salem and Albany, and with PNWR and CORP operating on the BNSF lines between Quinaby-Albany-Eugene. Of course, more than 40 BNSF employees will be adversely affected, owing to the exercise of seniority.

The injury is not only for employees presently working at yards on the Quinaby-Salem-Eugene line, or operating trains on the line, but also includes traffic movements now handled by BNSF trains with BNSF employees operating over the Union Pacific Railroad Company (UP) line between the Portland area and Bush. This is BNSF business, which is subject to diversion to all-PNWR handling between the Portland area and Eugene, and a loss of employment for BNSF personnel.

I term my analysis as preliminary. Although I have had some conversations with BNSF management, I have not been permitted to examine the lease mentioned by BNSF and Genesee & Wyoming, Inc. (GWI) in their respective press releases dated October 24, 2002. Our counsel advises that on December 18, 2002, he received a redacted copy of the lease, but that the terms of the protective order entered by the Board on December 16, 2002 preclude my examination of even the redacted copy. Of course, BNSF late on December 20, made public that part of the lease (Exhibit C, C-2, and C-3) which is its trackage rights agreement with PNWR, by attaching these exhibits to its BNSF-Trackage Rights-Bush/Albany filing.

I may be afforded additional information, hopefully also a copy of the lease, at the BNSF-UTU (and perhaps with other employee organizations) conferences under N&W Trackage. But the BNSF labor relations notices are conditioned upon the Board treating the Bush/Albany trackage rights as a separate matter and/or imposing N&W Trackage, Section 4.

The BNSF news release is my Appendix 2, and that for GWI is my Appendix 3.

It is clear to me from the information available to me that the involved transaction is not a simple 15-year lease, but rather is a joint BNSF-PNWR project for joint use of the Quinaby-Salem-Eugene line, and intermediate yards. For example, BNSF is to provide rail for the project for a 20-mile line upgrading, whereas PNWR is to provide other materials. This line segment was announced by BNSF and PNWR to be south of Salem (Appendix 2, 3):

"The agreement also provides for upgrading about 20 miles of the line south of Salem by 2006. Planned upgrades include heavier rail that will allow GWI to increase speeds, reduce car cycle times and improve overall service levels to rail customers. BNSF will provide the rail for the project, and GWI will provide the other material. Other details of the lease agreement were not disclosed."

I have been advised in discussions with BNSF management that the BNSF-PNWR upgrading project, south of Salem, is not on the Bush/Albany segment over which BNSF would have trackage rights under BNSF-Trackage Rights-Bush/Albany, but is south of Albany on the segment to be operated exclusively by PNWR, and with trackage rights for CORP between Albany and Eugene. In short, the term "south of Salem" is misleading, because Albany also is south of

Salem. The public announcements should have said "south of Albany."

There is the matter of interchange between BNSF and PNWR, raised by BNSF in its December 20, 2002 notice in BNSF-Trackage Rights-Bush/Albany. My Appendix 4 is a map which I have prepared (in color) for the involved area between Rocky Point, WA/Tongue Point, OR and Eugene, OR. Between Portland and Eugene, Union Pacific Railroad Company (UP) trains generally operate on the east side of the Willamette River, and BNSF trains generally operate on the west side of the Willamette River. Through a series of transactions, PNWR replaced BNSF on the west side of the river between Portland and Hopmere (M.P. 64.70), now shown as Quinaby in the December 6 notice, with BNSF accorded trackage rights over UP on the east side of the river between Portland and Salem, and BNSF going back on its own line between Salem and Eugene. Willamette & Pacific Railroad, Inc. (WP) acquired trackage rights over UP between Albany (Page) and Eugene. PNWR and WP are both GWI affiliates, which share offices and management in Oregon, and have coordinated operations.

The BNSF-PNWR interchange is projected to be at Minto (near Salem), and another BNSF-PNWR interchange at Albany. However, BNSF will also interchange with AERC at Albany, and BNSF interchanges with UP at Bush. These interchange points are somewhat interchangeable. I do not consider BNSF trackage rights between Albany and Bush to be necessary for interchange with PNWR; rather than at Albany, the BNSF-PNWR interchange could be at Bush or Minto, or a combination of the two. The Albany interchange, with the BNSF Bush/Albany 27.9-mile trackage rights, appears designed to control

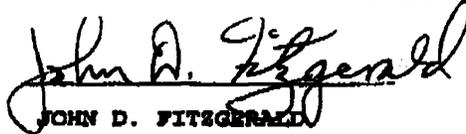
the routing of traffic, particularly with respect to AERC and UP, and perhaps CORP.

I view the transaction as a joint use and trackage rights project, which I am advised come under the statutory provisions of 49 U.S.C. 11323(a)(6), with the minimum employee protective conditions of New York Dock, or perhaps N&W Trackage. However, I believe enhanced conditions are necessary here, especially due to the large project and its impacts.

The injury to BNSF employees would be irreparable. If the exemption is permitted to become effective, with the operations as described in the two notices, employees would be injured. However, if the exemption subsequently is revoked by the Board, BNSF employees would not be made whole. I know of no provisions in our agreements with BNSF that provide damages in such a situation. Moreover, a reduced quality of living occasioned during the effective period of changed operations cannot be fully compensated or even measured.

VERIFICATION

Under the penalties of perjury, I affirm that the foregoing supplemental verified statement is true and correct as stated.


JOHN D. FITZGERALD

Dated at
Vancouver, WA
December 23, 2002

4/

Office of General Chairman GO-386
United Transportation Union
400 E. Evergreen Blvd, Suite 217
Vancouver, WA 98660 (360)694-7491

MEMO

To: G.P. MacDougall, Esq.
Fax (202) 331-8343 and U.S. Mail
From: J.D. Fitzgerald J.A.F.
Subject: FD 34255
Date: December 6, 2002

1. From the description of service and jobs PNWR proposed, the shippers in Eugene - Harrisburg will be serviced by only one (1) assigned crew where there are two (2) (Mon-Fri) now, working day and night shifts. Further, presently there are two (2) haulers working Mon-Sat between Albany and Eugene that perform service as needed in the Eugene-Harrisburg area on Saturday.
2. Communities will lose the salary monies from the displaced employees, some forty (40) total as follows:

Trainmen (ground crews)	18 Employees	
Engineers	9 Employees	
Maintenance of Way	6 Employees	
Car Forces	1 Employee	
Signal Maintainer	1 Employee	
Official	1 Employee	
663-664	4 Employees	(questionable due to trackage rights issue and traffic)
Total	40 Employees	

Additionally, welders, carmen assigned to wheel trucks, MOW crews and operating employees (train and engine service) from Portland/Vancouver supplement the above listed forty (40) employees.

Proposed number of PNWR employees is as follows

Train	4 Employees
Engine	4 Employees
Machinist	1 Employee
Car Forces	1 Employee
Signal Maintainer	1 Employee
Official	1 Employee
Total	15 Employees

with possibly one (1) additional engineer at Salem and one (1)

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additional conductor at Salem (not clear).

3. Communities will also be affected by loss of tax revenues (property and income tax, etc.) at a time when the state and counties are in economic crisis.
4. Wages, benefits, etc. for the forty (40) employees ranges between 203 million dollars annually. Wages for the proposed fifteen (15) to seventeen (17) PNWR employee will be significantly less, as will tax revenues. Medical coverage will likely only be provided for the employees, leaving dependents coverage to be paid by employee, further reducing any spending monies going to businesses and services in the respective communities from the wage structure.
5. Questions exist concerning potential cost for hazardous material that likely exist on the property to be leased and who will be responsible.
6. Question ability of PNWR to self fund any major incidents such as capitol construction without seeking monies from the State of Oregon/Lottery monies while BNSF has previously been self sufficient.
7. Dispatching will evidently be performed by PNWR facilities in McMinnville, OR but not sure due to lack of agreement or operation plan.
8. Car supply will be dependent on BNSF and/or Union Pacific and will be same at best, possibly not as high a priority.
9. Trackage rights, Portland to Labish (Salem, OR) dependent on UP. Overhead trackage rights, Salem to Albany, dependent on PNWR. Must have both to continue operation between Vancouver/Portland and Albany.
10. No indication of the effect of complaint petition by Albany and Eastern concerning interchange at Albany with BNSF. If the transaction occurs, BNSF will not control ~~ALBANY~~ ALBANY.

Thank you.

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Facts as presented by Portland and Western Railroad (PNWR):

1. Eugene, OR will have only one (1) job with one engineer and one round crew to perform all work in Eugene-Harrisburg areas.
2. Albany, OR will have one (1) or more crews to service industries in the Albany area, to switch trains and to interchange cars with the Albany Eastern
3. Six (6) day service will move rail traffic between Albany and Eugene and service the industries between Albany and Eugene-Harrisburg.
4. Salem one to two (1-2) man crew five (5) days per to service shipper and interchange with UP Railroad.

Facts as presently existing:

1. Two (2) crews working Monday through Friday, day and night, with one (1) engineer and two (2) ground personnel, each crew.
2. Two (2) Locals operating between Albany and Eugene and servicing industries six (6) days per week.
3. Two (2) yard engines at Albany with the ability to call extra crews to perform switching, interchange and train make up.
4. Salem one (1) three (3) man crew to perform switching interchange. Plus can call extra jobs as needed.

Facts that will not change:

1. Crews will only be allowed to work twelve (12) hours a day.
2. All traffic gathered at Albany, OR or Salem, OR will be dependent on BNSF for handling to Portland/Vancouver for furtherance.
3. Track speed will not be altered for an unspecified time.

Conclusions that can be made:

1. One crew in Eugene-Harrisburg will not provide the present level of service.
2. If only one PNWR crew works between Eugene and Albany service be worse than at present.
3. Car supply and connections via BNSF will not be guaranteed or will not be improved except by BNSF handling.
4. Traffic will move Albany-Vancouver/Vancouver-Albany no better than present and possibly worse depending on PNWR traffic and trains.

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SPS

Assignment Board: 10 Station: ALBANY, OR Board Type: XB CP
Desc: ALBANY COND XTB-HOLDS 1 11/25/02 Eligible: 2 Assigned: 2

Posn	Roster	A Advr	Rest	
Numb	Employee Name	Seq	Numb S Numb	Days
0002	JL FISHER	01379	CO05 P	
0003	MK BAHR	01139	CO05 P	

***** End of Board *****

SPS

Assignment Board: 20 Station: ALBANY, OR Board Type: XB BF
Desc: ALBANY BRKM XTB-HOLDS 1 11/25/02 Eligible: 1 Assigned: 1

Posn	Roster	A Advr	Rest	
Numb	Employee Name	Seq	Numb S Numb	Days
0003	MG SCHORR	01855	BK05 P	

***** End of Board *****

SPS

Assignment Board: 30 Station: ALBANY, OR Board Type: XB EP Cycle: 0601
Desc: ALBANY ENGR XBD-HOLDS 4 11/25/02 Eligible: 2 Assigned: 2

Posn	Roster	A Advr	Rest	
Numb	Employee Name	Seq	Numb S Numb	Days
0001	JD MCCLINTIC	00402	EN05 P	A08
0002	R MOORE	00655	EN05 P	G07

***** End of Board *****

SPS

Assignment Board: 50 Station: ALBANY, OR Board Type: YD YC
Desc: ALBANY YARD JOBS

Job	Roster	A Advr	
Number Oc	Employee Name	Seq	Numb S Numb
Desc: 0700 SALEM Rest Days: SA SU PAY NO 131			
ALB131I 13	RA ABBETT	00542	BK05 P DH ALB-SAL 45MIN
ALB131I 14	DA LAUDERBACK	00840	BK05 P DH VAW-SAL 1 HOUR
ALB131I 11	DE GATES	00386	EN05 P 5 DAY ASSIGNMENT
Desc: 0700 ALBANY Rest Days: SU MO PAY NO 132			
ALB132G 13	RD STURM	01226	BK05 P DH VAW-ALB 1 1/2 HRS
ALB132G 14	GR RACKHAM	01460	BK05 P 6DA SWG 401R SUNDAY
ALB132G 11	DA PARKHURST	00734	EN05 P
Desc: 0700 EUGENE YD SWITCH Rest Days: SA SU PAY NO 135			
ALB135G 13	DW EISELE	00043	BK05 P DH ALB-EUG 1HR
ALB135G 14	JT HUBBARD	00699	BK05 P DH VAW-EUG 2 1/2 HRS
ALB135G 11	GA MILLER	00168	EN05 P 5 DAY ASSIGNMENT
ALB135G 24	SD FERGUSON	00762	BK05 P
Desc: 1700 EUGENE Rest Days: SA SU PAY NO 233			
ALB233G 13	BG HUPPUNEN	01795	BK05 P DH ALB-EUG 1HR
ALB233G 14	BJ MOE	01802	BK05 P DH VAW-EUG 2 1/2 HRS
ALB233G 11	MD MONTGOMERY	00560	EN05 P 5 DAY ASSIGNMENT
Desc: ALBANY SWITCH Rest Days: SA SU PAY NO 401			
ALB401R 11	DM LUTHER	00416	EN05 P DH VAW-ALB 1 1/2 HRS
ALB401R 13	AL VOLAVKA	01806	BK05 P M132/TWTF 1600PM (XTB)
ALB401R 14	D KERSTEN	01834	BK05 P
Desc: EXTRA EUGENE SWITCH Rest Days:			

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ALB501X 13	P	EXTRA - EUGENE
ALB501X 14	P	DH ALB-EUG 1HR
ALB501X 11	P	DH VAW-EUG 2 1/2 HRS
Desc: EXTRA SALEM SWITCH	Rest Days:	
ALB502X 13	P	EXTRA - SALEM
ALB502X 14	P	DH ALB-SAL 45MIN
ALB502X 11	P	DH VAW-SAL 1HR
Desc: EXTRA ALBANY SWITCH	Rest Days:	
ALB503X 13	P	EXTRA - ALBANY
ALB503X 14	P	DH VAW-ALB 1 1/2HR
ALB503X 11	P	
Desc: YARD WORK TRAIN (MECH)	Rest Days:	
ALB5501 13	P	EXTRA ALBANY MECH
ALB5501 14	P	DH VAW-ALB 1 1/2 HR
ALB5501 11	P	
ALB5501 10	P	
Desc: YARD WORK TRAIN (MOW)	Rest Days:	
ALB5601 13	P	EXTRA ALBANY MOW
ALB5601 14	P	DH VAW-ALB 1 1/2 HR
ALB5601 11	P	
ALB5601 10	P	
Desc: XTRA UTILITY AT ALBANY	Rest Days:	
ALB771X 18	P	EXTRA - DH VAW-ALB 1 1/2HR

***** End of Board *****

SPS

Assignment Board: 60 Station: ALBANY, OR Board Type: LC TC
 Desc: LOCALS, RDSW & ASSIGNED WORK TRAINS

Job	Roster	A Advr	Comments
Number Oc Employee Name	Seq Numb S Numb		
Desc: 1600 ALBANY-EUGENE RNWE4871	Rest Days: SU		1600 R NWE
ALB4871 03 LM HARRIS	00596 CO05 P		DH VAW-ALB 1 1/2HRS
ALB4871 05 MW HARVEY	01891 BK05 T		MTWTF5 RNWE4871
ALB4871 01 SS GALPIN	00739 EN05 P		O/D 1600
Desc: 0500 ALBANY-EUGENE RNWE4881	Rest Days: SU		0500 R NWE
ALB4881 03 DP SACKS	00525 CO05 P		DH VAW-ALB 1 1/2HRS
ALB4881 05 CT ANDERSON	00031 BK05 P		MTWTF5 RNWE4881
ALB4881 01 AD FERGUSON	00170 EN05 P		O/D 0500

***** End of Board *****

SPS

Assignment Board: 7 Station: ALBANY, OR Board Type: FR BK
 Desc: ALBANY FURLOUGH EMPLOYEES

Posn	--Roster--	A Advr	Prod	Comments
Numb Employee Name	Seq Numb S Numb	Job		

***** End of Board *****

SPS

Assignment Board: 5 Station: ALBANY, OR Board Type: LA MS
 Desc: CUT OFF/TRAINMASTER AUTHORITY BOARD

Posn	--Roster--	A Advr	Prod	Comments
Numb Employee Name	Seq Numb S Numb	Job		

+HR CLARK	00317 BK05 P			
FD COLTON	00115 EN05 P			

***** End of Board *****

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SPS
Assignment Board: 4 Station: ALBANY, OR Board Type: BP MS
Desc: BUMP

Posn	--Roster--		A Advr	Prod	
Numb	Employee Name	Seq	Numb	S Numb	Job
MW HARVEY		01891	BK05	P	
***** End of Board *****					

.... END OF REPORT

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We Can Move Your World.

News Release

Genesee & Wyoming Adds Rail Line in Oregon through Lease with Burlington Northern Santa Fe

GREENWICH, Conn., and FORT WORTH, Texas, October 24, 2002 --

Genesee & Wyoming Inc. (GWI) (NYSE: GWR) announced today that it has signed a 15-year agreement with The Burlington Northern and Santa Fe Railway Company (BNSF) to lease a 76-mile rail line between the cities of Salem and Eugene, Oregon. The rail line is contiguous with GWI's Portland & Western railroad and increases the size of the Company's Oregon Region to 523 miles.

GWI expects that the new rail line will add approximately 20,000 carloads of traffic per year, including paper, lumber and agricultural products. The line is also expected to enhance GWI's Oregon operations through more efficient routing of existing traffic.

The agreement also provides for upgrading about 20 miles of the line south of Salem by 2006. Planned upgrades include heavier rail that will allow GWI to increase speeds, reduce car cycle times and improve overall service levels to rail customers. BNSF will provide the rail for the project, and GWI will provide the other material. Other details of the lease agreement were not disclosed.

Mortimer B. Fuller, III, Chairman and CEO of GWI, commented, "We are pleased to be selected by BNSF to lease this property. The addition of the line is a good illustration of our strategy of building regional rail systems. We entered Oregon in 1993, and this transaction represents our fourth acquisition in the region. Our Oregon revenue base has now grown to approximately \$28 million. In conjunction with our Class I partners, we look forward to further building our traffic in the Pacific Northwest."

Pete Rickershauser, BNSF's vice president, Network Development, stated that "Shortline operators can provide valuable and efficient service that supports our carload growth strategy. They feed us traffic through service offerings closely tailored to the needs of our shippers located on their lines. We have found the Portland & Western and other GWI properties to be innovative, nimble, and responsive service providers, and we look forward to working with them to maximize the value of this line to our customers and to BNSF. Combining GWI's extended Oregon network with BNSF's extensive route network should provide enhanced opportunity for superior rail service products which will bring freight back to the railroads."

GWI is a leading operator of shortline and regional freight railroads in the United States, Canada, Mexico, Australia and Bolivia, and provides freight car switching and related services to industrial companies that have extensive railroad facilities within their complexes. The Company operates in five countries on three continents over more than 8,000 miles of owned and leased track. It also operates over an additional 3,000 miles under track access arrangements.

A subsidiary of Burlington Northern Santa Fe Corporation (NYSE:BNI), BNSF operates one of the largest railroad networks in North America, with 33,000 route miles covering 28 states and two Canadian provinces. BNSF is an industry leader in Web-enabling a variety of customer transactions at www.bnsf.com. The railway is America's largest grain-hauling railroad, transports the mineral components of many of the products we depend on daily, moves more intermodal traffic than any other rail system in the world, and hauls enough coal to generate more than 10 percent of the electricity produced in the United States.

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APPENDIX 2

Genesee & Wyoming Adds Rail Line in Oregon through Lease with Burlington Northern Santa Fe

GREENWICH, Conn., and FORT WORTH, Texas, October 24, 2002 /PRNewswire-FirstCall/ -- Genesee & Wyoming Inc. (GWI) (NYSE: GWR) announced today that it has signed a 15-year agreement with The Burlington Northern and Santa Fe Railway Company (BNSF) to lease a 76-mile rail line between the cities of Salem and Eugene, Oregon. The rail line is contiguous with GWI's Portland & Western railroad and increases the size of the Company's Oregon Region to 523 miles.

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SOURCE Genesee & Wyoming Inc.; Burlington Northern and Santa Fe Railway

Company

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BNSF, 817-867-6418

