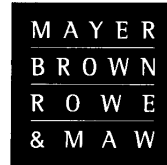


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September 2, 2003

BY HAND DELIVERY

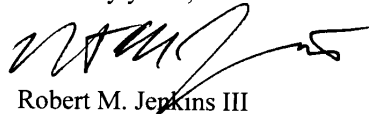
Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Re: Docket No. NOR-42076 – Albany & Eastern
Railroad Company v. The Burlington
Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of BNSF's "Reply to Petition for Reconsideration and Request for Clarification Or, Alternatively, Petition for Reconsideration." Please date-stamp the extra copy that is enclosed and return it to our representative.

Sincerely yours,



Robert M. Jenkins III

ENTERED
Office of Proceedings

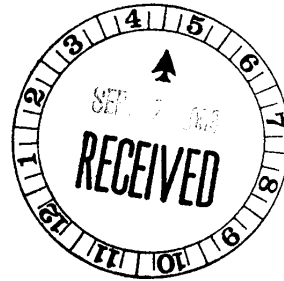
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Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD



DOCKET No. 42076

ALBANY & EASTERN RAILROAD COMPANY

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

**REPLY TO PETITION FOR RECONSIDERATION AND
REQUEST FOR CLARIFICATION OR, ALTERNATIVELY,
PETITION FOR RECONSIDERATION**

The Burlington Northern and Santa Fe Railway Company ("BNSF") replies here to the Petition for Reconsideration filed by John D. Fitzgerald, for and on behalf of United Transportation Union—General Committee of Adjustment ("UTU/GO-386"), on August 11, 2003. The Petition seeks reconsideration of the Board's Decision served July 22, 2003 ("July 22 Decision"). As a general matter, BNSF expresses no opinion with respect to the majority of the issues raised either by UTU/GO-386 in its Petition or by the Board in its July 22 Decision. However, BNSF believes it is both necessary and appropriate to respond to UTU/GO-386's claim that the Board has improperly prejudged one of the key issues in dispute in this proceeding – namely, whether the traffic in question constitutes "new traffic" within the meaning of the Rail Industry Agreement ("RIA"). BNSF believes that a proper reading of the Board's July 22 Decision demonstrates that the Board has made no such judgment. Nevertheless, to avoid any

doubt in this regard, BNSF respectfully requests that the Board clarify its July 22 Decision to confirm that it has not prejudged this or any other issue in controversy in this proceeding. Alternatively, BNSF requests reconsideration of that Decision.

Background

In 1998 BNSF and the Albany and Eastern Railroad Company ("AERC") entered into an agreement under which AERC acquired BNSF's line between Lebanon and Foster, Oregon, and incidental trackage rights to enable traffic on the line to continue to move through BNSF's yard in Albany, Oregon.¹ The parties agreed that the consideration AERC paid for the line did not include the franchise value and going concern value to BNSF of the rail transportation business to and from the line. Accordingly, if AERC interchanged traffic moving to or from the line with a rail carrier other than BNSF, the agreement provided for AERC to pay a fee to BNSF for each car so interchanged. In the rail industry this type of agreement is sometimes referred to as a "paper barrier."

On November 26, 2002, AERC filed with the Board a "Complaint to Commence Arbitration Under 49 C.F.R. Part 1108.7(a)." In its Complaint AERC demanded that BNSF agree to arbitrate the issues raised in its complaint, because BNSF is a signatory to the RIA, and the RIA provides for arbitration of certain "paper barrier" issues. AERC Complaint, ¶ 7.² AERC asserted that Section IV(3), Example 3 of the RIA requires

¹ See *Albany & Eastern Railroad Company—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company* (Finance Docket No. 33567, served May 21, 1998).

² The RIA is a voluntary agreement negotiated between the Association of American Railroads ("AAR") and the American Short Line and Regional Railroad Association ("ASLRRA") that provides basic policies and principles for resolving certain disputes that may arise from time to time between Class I and Class III railroads. If signatories to the agreement are unable to resolve disputes through discussion or mediation,

(cont'd)

BNSF to waive the paper barrier with respect to certain traffic moving from Bauman and Sweet Home, Oregon, because, in AERC's opinion, the traffic is "new traffic" for which BNSF cannot compete. AERC listed the question of whether this was in fact "new traffic" within the meaning of the RIA as one of the issues to be arbitrated. AERC Complaint ¶ 3(b).

On December 26, 2003, BNSF filed an Answer in response to AERC's Complaint. BNSF denied that the traffic moving from Bauman and Sweet Home, Oregon, was "new traffic" within the meaning of the RIA or that it had failed to compete for that traffic.

On December 11, 2003, UTU/GO-386 filed a Petition for Leave to Intervene in the proceeding. On February 6, 2003, UTU/GO-386 filed a Supplement to that Petition. In a decision served February 13, 2003, the Director of the Board's Office of Proceedings denied UTU/GO-386's request to intervene. UTU/GO-386 appealed that decision to the Board on February 24, 2003. In its Decision served July 22, 2003, the Board denied UTU/GO-386's appeal and upheld the February 13 decision of the Director of the Office of Proceedings. On August 11, 2003, UTU/GO-386 responded to the Board's decision by filing the Petition for Reconsideration that is the subject of this pleading.

(... cont'd)

the agreement provides for them to submit any unresolved issues to arbitration under the auspices of the STB.

Argument

In its Petition for Reconsideration, UTU/GO-386 asserts that the Board has improperly and incorrectly predetermined that the traffic in dispute in this case is "new traffic" within the meaning of the RIA. While BNSF agrees with UTU/GO-386 that the traffic in question does not meet the definition of "new traffic" contained within the RIA, BNSF does not believe that the Board made any such determination in its July 22 Decision.

UTU/GO-386 asserts that the Board determined that the disputed traffic was "new traffic" in footnote 7 on page 3 of the July 22 Decision, in which the Board suggested that rail employees would not be harmed by the arbitration's outcome, and in paragraph 2 on page 3, when it sustained its jurisdiction over the matter. UTU/GO-386 August 11 Petition at 9. BNSF acknowledges that when viewed in isolation the Board's two statements could, at first blush, seem to indicate that the Board has concluded that the disputed traffic constitutes "new traffic" within the meaning of the RIA. However, when read in the context of the Board's entire decision and the Board's other statements contained therein, it is clear that the Board made no such determination.

The Board's statement in footnote 7 of the July 22 Decision was clearly intended to address UTU/GO-386's express concern that its members that were BNSF employees (hereinafter "BNSF members") would be adversely affected if the arbitrator were to rule in favor of AERC and waive the paper barrier. UTU/GO-386 argued in both its Petition for Leave to Intervene and its Appeal that BNSF members would be harmed if traffic were diverted from BNSF to UP. See Petition for Leave to Intervene, Docket No. 42076 (December 11, 2002) at 3 and Appeal, Docket No. 42076 (February 24,

2003) at 9. In footnote 7 of the July 22 Decision, the Board was simply opining that as a practical matter BNSF members could not be harmed if the arbitrator ruled that the traffic at issue was "new traffic" for which BNSF could not compete, because there would be no traffic for BNSF members to lose.

BNSF also believes that UTU/GO-386 has misread the Board's reference to "new traffic" in paragraph 2 on page 3 in response to UTU/GO-386's assertion that AERC failed to establish the Board's jurisdiction over its complaint. UTU/GO-386 claims that the Board's reference to "interchange rights for new traffic" shows that the Board has already concluded that the traffic in question is "new traffic". BNSF does not believe that the Board intended this reference to imply that it had concluded that the traffic in dispute constituted "new traffic" for purposes of the application of the RIA. BNSF believes that a fair reading of the Decision shows that the Board was simply explaining that its jurisdiction was not limited to traffic already moving over the line but extended as well to disputes involving the rights to any new traffic that may move over the line.

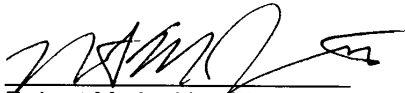
Conclusion

BNSF respectfully requests that the Board clarify that BNSF's understanding is correct and that the Board in no way concluded in its July 22 Decision that the traffic in dispute in this case is "new traffic" within the meaning of the RIA. BNSF firmly believes that its understanding is consistent with a full and fair reading of the Board's July 22 Decision. Moreover, the "new traffic" issue is in fact one of the issues at the heart of the arbitration between BNSF and AERC and could not properly be predetermined by the Board. In the unlikely event that the Board holds that it intended to predetermine the issue as to whether the traffic in controversy is "new traffic" within the meaning of the

RIA, BNSF requests that the Board grant BNSF an extension of time pursuant to 49 CFR §1115.3(e) and treat this Reply as a Petition for Reconsideration of the Board's July 22 Decision.

Respectfully submitted,

Richard E. Weicher
Sidney L. Strickland, Jr.
Michael E. Roper
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SANTA FE RAILWAY COMPANY
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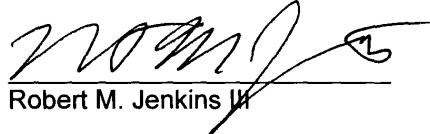

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Attorneys for The Burlington Northern and Santa Fe Railway Company

Dated: September 2, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Petition for Reconsideration and Request for Clarification or, Alternatively, Petition for Reconsideration has been served by hand delivery on counsel for the United Transportation Union—General Committee of Adjustment, Gordon P. MacDougall, and by first-class mail on counsel for the Albany and Eastern Railroad Company, Thomas F. McFarland, this 2nd day of September 2003.



Robert M. Jenkins III