

PAUL C. THOMPSON  
International President

RICK L. MARCEAU  
Assistant President

DAN E. JOHNSON  
General Secretary and Treasurer



14600 DETROIT AVENUE  
CLEVELAND, OHIO 44107-4250  
PHONE: 216-228-9400  
FAX: 216-228-0937  
www.utu.org

**LEGAL DEPARTMENT**

CLINTON J. MILLER, III  
General Counsel

• KEVIN C. BRODAR  
Associate General Counsel

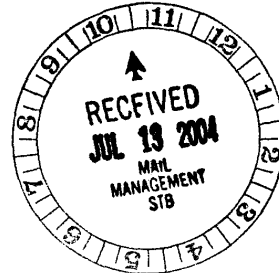
• ROBERT L. McCARTY  
Associate General Counsel

• DANIEL R. ELLIOTT, III  
Associate General Counsel

**UPS Next Day Air**

July 9, 2004

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423-0001  
(202) 565-1519



Re: Finance Docket No. 34503

Dear Secretary Williams:

Please find enclosed the original and ten copies of United Transportation Union's Verified Petition to Revoke for filing in the above-captioned matter. Also I have enclosed a disk in WordPerfect format in accordance with prior Board requirements.

The \$200.00 filing fee has already been forwarded to the Board.

Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "D. R. Elliott, III".

Daniel R. Elliott, III  
Associate General Counsel

Enclosures

cc: C. J. Miller, III, General Counsel  
D. K. Turner, Alternate Vice President -Yardmasters  
P. W. Tibbit, General Chairperson

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Office of Proceedings

JUL 13 2004

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Public Record

211554

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34503

TIMBER ROCK RAILROAD, INC.  
- LEASE EXEMPTION -  
THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

VERIFIED PETITION TO REVOKE



ENTERED  
Office of Proceedings

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Public Record

United Transportation Union ("UTU") respectfully petitions the Board to revoke the petition in the above-referenced proceeding in accordance with 49 U.S.C. § 10502. The revocation of this exemption in whole "is necessary to carry out the transportation policy of section 10101 of this title." *Id.*

**FACTS**

On June 24, 2004, Timber Rock Railroad, Inc. ("TRRR"), a Class III rail carrier, filed a Notice of Exemption pursuant to 49 C.F.R. Part 1150, Subpart E – Exempt Transactions Under 49 U.S.C. § 10902, to permit TRRR to lease 117.82 miles of rail lines from the Burlington Northern and Santa Fe Railway Company ("BNSF"). As part of this transaction, TRRR also acquired incidental trackage rights over 54.72 miles of BNSF rail lines in order to interchange traffic with BNSF at Somerville and Beaumont, Texas. TRRR's lease of the rail lines was expected to be consummated on or shortly after July 3, 2004 in accordance with the 60-day notice procedure set forth in these regulations. 49 C.F.R. § 1150.42(e).

The line involved in this transaction is a line that provides an alternate route east/west from New Orleans to points west that avoids the traffic-intense corridor through Houston, Texas. As is

well-known in the rail industry, Houston is already burdened by a major traffic congestion problem at present. The lease of this line would further exacerbate the problem.

Additionally, this line, known as the "Conroe Subdivision," is the route currently used to handle military trains between Forth Worth and the Port of Beaumont. Without this route, the military moves would also be funneled through Houston, again adding to an already serious congestion problem.

There are occasions now when crews called on duty at Houston will spend their entire tour of duty entirely within the limits of the Houston Terminal. At best, a crew will have hours on duty prior to departing or yarding their trains at Houston. The number of crews going DOL in Houston and the surrounding area as well as en route creates a shortage of crew transport vehicles adding additional hours to a tour of duty and adding to the problem of crew availability. Consequently, this transaction would only cause greater congestion problems than those already in existence in the Houston area, because it would detour the BNSF traffic through Houston.

#### **ARGUMENT**

TRRR seeks approval of this transaction under Section 10902, which shall be given "unless the Board finds that such activities are inconsistent with the public convenience and necessity." 49 U.S.C. § 10902(c). Here, TRRR invokes the Board's class exemption at 49 C.F.R. § 1150.41 for this lease. Pursuant to the 49 U.S.C. § 10502 (d)), "[t]he Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title."

49 U.S.C. § 10101 provides in pertinent part:

In regulating the railroad industry, it is the policy of the

United States Government –

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

\* \* \*

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

\* \* \*

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

\* \* \*

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry.

In addition, “[a] rail carrier providing transportation or service subject to the jurisdiction of the Board . . . shall provide the transportation or service on reasonable request.” 49 U.S.C. § 11101(a). “When the Board determines that shortage of equipment, congestion of traffic, unauthorized cessation of operations, or other failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantive adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier . . . cannot transport the traffic offered to it in a manner that properly serves the public,” the Board may take immediate action “to promote commerce

and service to the public.” 49 U.S.C. § 11123(a). “[D]uring time of war,” these obligations must be further examined to ensure all transportation needs are met “where it is essential to the defense and security of the United States.” 49 U.S.C. § 11124(a).

On June 10, 2004, Surface Transportation Board Chairman Roger Nober announced that he had sent a letter to each of the Class I railroads asking each to report to the Board on its plans to meet the expected increase in demand during the fall shipping season, which is known as the “Peak Season” because demand for rail service is usually at its highest levels at this time.

The Chairman noted:

[O]ur shared objective must continue to be to work toward achieving the highest possible level of operational efficiency for the railroad industry and service performance for the shipping public.

Chairman Nober’s letters acknowledged that the industry is carrying an unprecedented amount of freight and has worked to improve customer service, inter-railroad coordination and cooperation, and the development of new service offerings. At the same time, the Chairman expressed concern over increasing service demands on all Class I railroads, and especially over the handling of the anticipated Peak Season volumes.

The Chairman thus requested that each railroad provide the Board with its plan for handling the Peak Season traffic. The Chairman requested to be apprised of the steps each railroad is taking to prepare for the fall shipping season and of how each railroad will share its plans with its customers.

This concern by the Board is obviously justified since “[t]he railroads already are struggling to handle volume surges, and their operating metrics since the beginning of the year show little improvement. As shippers continue to experience poor service, there is concern whether the railroads

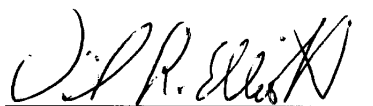
will have time to hit their stride once the peak season hits in July.” John Gallagher, “Running Out of Track,” Traffic World, June 27, 2004, at 27 (copy attached). The congestion problems in Houston, Texas are certainly at the heart of this concern, and no one wants a repeat of the UP/SP merger debacle of 1997-1998. The serious traffic problems in the area affected by this transaction are obviously no secret.

This transaction shows every sign of exacerbating this growing problem by diverting existing Burlington Northern and Santa Fe Railway Company traffic from the line being leased into the already overwhelmed Houston area, which could be disastrous considering July is the beginning of “peak season.” Moreover, since this line is crucial to the delivery of military supplies for the ongoing war effort, which apparently is going to continue for many years to come based on the recent news reports regarding the insurgency, no risks should be taken regarding the flow of traffic in this area at this crucial time shortly after the hand over of power.

#### **CONCLUSION**

Since this transaction does not “carry out the transportation policy,” as described above, the Board should revoke this transaction.

Respectfully submitted,



Daniel R. Elliott, III  
Associate General Counsel  
United Transportation Union  
14600 Detroit Avenue  
Cleveland, Ohio 44107  
Tel: (216) 228-9400  
Fax: (216) 228-0937

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing United Transportation Union's Verified Petition to Revoke has been served this 9th day of July, 2004 via first-class, postage pre-paid mail upon the following:

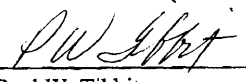
Karl Morrell  
Ball Janik LLP  
Suite 225  
1455 F Street, N.W.  
Washington, DC 20005  
(202) 638-3307

  
\_\_\_\_\_  
Daniel R. Elliott, III

**VERIFICATION**

I, Paul W. Tibbit, United Transportation Union General Chairperson on Burlington Northern and Santa Fe Railway Company, verify under penalty of perjury that I have read the above and foregoing Verified Petition to Revoke, that I have knowledge of the facts stated therein; and that those facts are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on

July 8, 2004  
\_\_\_\_\_  
Paul W. Tibbit



# Running Out of Track

BY JOHN GALLAGHER

**Railroads asked to reveal peak season operating plans; tight capacity, high volumes are volatile mix**

**C**ould the triple threat of high demand, tight capacity and poor service run the railroads into the ground when the peak shipping season hits this summer?

Surface Transportation Board chairman Roger Nober is taking no chances. Nober is asking each Class 1 railroad to submit to the board a shipping plan outlining steps they are taking to prepare for this year's peak and how each railroad will share its plans with its customers.

"This will give us the ability to see if the railroads' plans are adequate and to provide a give and take dialogue if any issues arise," Nober said. "I think this will serve as a positive catalyst so that we can all see the projected demand and provide a clear and open dialogue between the carriers and their customers. If we can facilitate that dialogue I think the shipping public benefits."

Nober says the likelihood of a rail meltdown is remote, but industry observers say there are strong reasons to be concerned.

The railroads already are struggling to handle volume surges, and their operating metrics since the beginning of the year show little improvement. As shippers continue to experience poor service, there is concern whether the railroads will have time to hit their stride once the peak season hits in July.

The pressure being exerted on the rail system leaves little room for error. "We're in a situation where capacity is being rapidly used up and therefore there's not a lot of flexibility in the network," said Bob Jankowitz, an analyst with Moody's

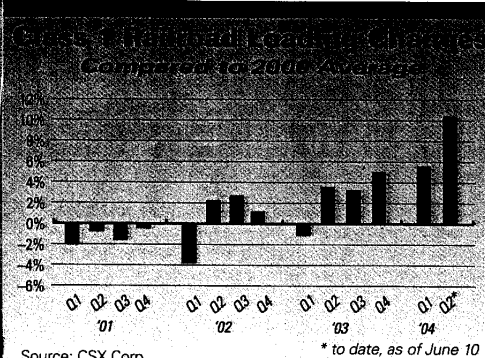
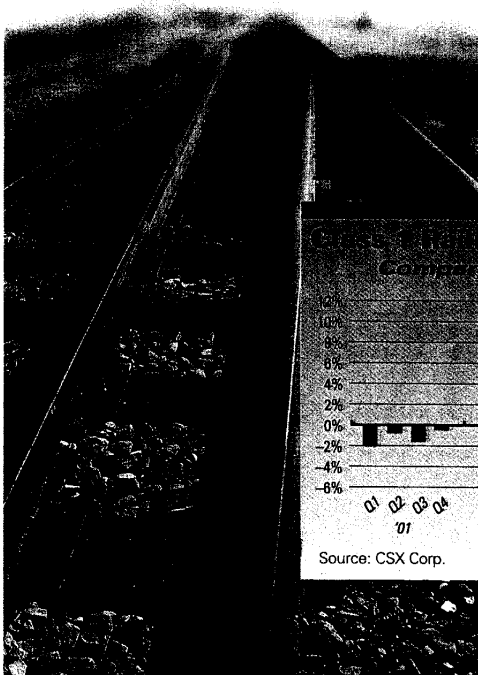
Investor Services. "The whole transportation infrastructure is quite interdependent. Any catastrophic event that occurs could truly affect the ability to move freight."

"Normally there's more (capacity) in

was particularly hurt when drayage truck drivers struck UP intermodal facilities in northern California in May. Pacer estimated that UP's inability to load Pacer's containers, coupled with UP's other service problems, slashed Pacer's income by an estimated \$3 million.

"Rail service is a problem and in the short term we're getting hurt," Orris said.

"Shippers are looking to alternatives; freight shifting to truck is definitely happening. But there's not a lot of truck capacity to tap into. We're shifting freight to our own truck operators where it



makes sense for our customers." Pacer also is moving some freight to UP rival Burlington Northern Santa Fe Railway in selective lanes, Orris said, "but it's pricey."

The railroads say they are working hard to avert disaster.

UP is speeding up delivery of 125 locomotives from 2005 to this year's third quarter. CSX soon will roll out a new operating plan to more accurately match rail capacity to business levels. BNSF, which has the nation's largest intermodal network, is adding 3,700 platforms to its double stack intermodal network, boosting intermodal capacity by 10 percent.

"It's been heartening to see railroads taking actions to deal with the growing volumes, both in their pricing strategies

the system but service issues just take away any kind of ability to absorb a hit," said Don Orris, Chairman and CEO of logistics company Pacer International. "If we get any (adverse) event during the quarter — a strike, for example — it will be tough."

**P**acer, which moves 25,000-30,000 containers annually over Union Pacific Railroad's network, already has been hit. It

## Correction

A story in the June 7 edition of *Freight* incorrectly identified the location of the primary leader, James Lee Smith, BNA's president and CEO.



and in adding to capacity," said Pat Casey, director of forecasting and planning for TTX, which provides roughly two-thirds of the national rail industry fleet of intermodal and automotive equipment.

Casey said TTX was "cautious" about the rail industry's ability to meet peak season demand. "We're getting cars out as quickly as we can to supply what we think will be a very busy fall season. The intermodal fleet will be up close to 11 percent over last year by end of year."

Shippers should not rely solely on the railroads' efforts. Steve Wieby, vice president of intermodal at \$3.6 billion logistics provider C.H. Robinson, agrees that there's "a lot of concern" over the railroads' ability to meet the peak shipping season capacity requirements. "That's why we're advising customers to take a proactive stance."

For example, he said shippers should develop flexibility in the type of boxes they can ship. Although 53-foot equipment is standard, "there's a lot more capacity available in the 48- and 45-foot programs, so shippers that are able should consider shifting," he said.

Shippers also should consider investing in preferred and guaranteed rail programs such as BNSF's intermodal reservation program and UP's "Blue Streak" service.

## A North American Rail Summit?

Canadian Pacific Railway president and CEO Rob Ritchie wants a North American rail industry summit after the November presidential election to address infrastructure expansion to deal with cross-border trade growth.

The proposal, which would involve the governments of Canada, United States and Mexico, has been "enthusiastically embraced" by the Class I railroads, Ritchie said.

"Canada's railways and highways are facing precisely the same capacity stress situation" as the U.S. railroads, Ritchie said. "We need to take major steps to address it now."

Ritchie called for regulatory and taxation changes that will allow railways to increase the pace of investment in their networks. However, those regulatory changes should not include opening lines to competition.

"It's now fashionable for some shippers to say there should be more competition in the rail industry," he said. "They say railways should be regulated like gas, electric, and telecommunications utilities, and that anyone who wants to provide rail service should simply be able to come onto another railway's lines. This regulated running rights argument may be compelling to some, but it is patently false because it ignores the plain fact that rail freight is not homogeneous and not fungible. Open access is scaring away the investment railways need to fund expansion of their capacity today."

— by John Gallagher

These steps should be taken as early as possible, not waiting for summer volumes to hit, he said.

In addition, shippers should consider blending modes in their distribution network to allow for more flexibility, Wieby said. A customer with no rail siding should consider trucking it to a cross dock, shifting to rail, on to a forward distribution warehouse, then trucking to des-

tinuation instead of going all truck or all rail. "This makes the supply chain longer, but shipping in advance with a forward distribution pattern can help alleviate potential problems."

Wieby urged shippers to plan now to strengthen relationships "so you can respond quickly." His ultimate advice is: "Don't be afraid to spend more money now to save money later." ●

## Another Rail Shipper 'Win'

**Rail market pricing power still a concern for coal shippers despite favorable STB ruling**

**A** 20 percent reduction in its transportation rate over the next 20 years and \$15 million in reparations was not enough to satisfy a Colorado coal shipper at the Surface Transportation Board.

To an attorney representing Xcel Energy, the outcome in *Xcel Energy v. Burlington Northern Santa Fe Railway* mirrored the recent *Carolina Power & Light v. Norfolk Southern* rate case, in that the shipper won the battle to reduce rates but lost the war over rail market power.

"We were looking for a 40 percent reduction in rates, but instead got half of that," said Tom Wilcox, who represented Xcel. "We're happy with the win but the rate (set by BNSF) was so high we felt a greater reduction was warranted."

The decision marked the first time in

more than a year that a coal rate case was decided by a full board. Commissioners Frank Mulvey and Douglas Buttrey joined STB chairman Roger Nober earlier this month.

"It's difficult to make decisions that please everyone — we can only work on the evidence presented," Nober said. "But at least in this case, I had two commissioners that happened to agree with me."

Shippers also took heart in the board's decision to include so-called "cross-over" traffic, a potentially significant reading for pending and future coal rate cases and potential future cases. BNSF fought to exclude such traffic — which takes into account revenue other than that generated from the complaining shipper when analyzing the railroad's costs — claiming that using it "severs the connection between

the revenues and costs associated with serving that traffic."

The STB disagreed, saying a principal goal of the STB's analysis is to determine whether the complaining shipper bears the costs of railroad services and facilities that the shipper does not use. By including cross-over traffic, "the costs of those facilities are properly shared with other traffic using those same facilities," the STB said. Excluding cross-over traffic in its analysis "could result eventually in a complainant having to replicate almost all of BNSF's system. The scope and complexity of the proceeding would expand exponentially."

"This makes gives more flexibility in the development of (the shipper's case)," said Jeff Moreno, who represents Otter Tail Power, a coal shipper in an upcoming rate case against BNSF. "It makes it much less complex."

— by John Gallagher