

DID# 0102142001

BNSF

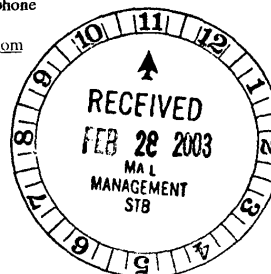


SARAH WHITLEY BAILIFF
Senior General Attorney

207316

**The Burlington Northern and
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VIA UPS OVERNIGHT MAIL

February 27, 2003

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

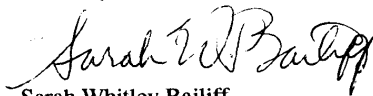
**Re: Surface Transportation Board Finance Docket No. 34316 (Sub. No. 1); The
Burlington Northern and Santa Fe Railway Company -- Trackage Rights
Exemption -- Union Pacific Railroad Company -- Placedo, TX to Karney, TX**

Dear Secretary Williams:

Enclosed for filing in the referenced docket are the original and ten copies of BNSF's Petition for Partial Revocation of Class Exemption and for Temporary Exemption of Trackage Rights, and a check for \$150.00, covering the filing fee.

Please acknowledge receipt of this material by date stamping the enclosed copy of this letter and returning it to me in the enclosed self-addressed stamped envelope.

Sincerely,



Sarah Whitley Bailiff

ENTERED
Office of Proceedings

SWB/js

FEB 28 2003

cc: Larry Wzorek (UPRR) (w/encl.)

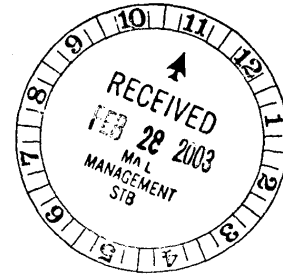
Part of
Public Record

FEB 28 2003

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

207316

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 34316 (Sub. No. 1)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY--TRACKAGE RIGHTS EXEMPTION--
UNION PACIFIC RAILROAD COMPANY--
PLACEDO, TX TO KAMEY, TX

PETITION FOR PARTIAL REVOCATION OF CLASS EXEMPTION AND FOR
TEMPORARY EXEMPTION OF TRACKAGE RIGHTS

ENTERED
Office of Proceedings

FEB 26 2003

Part of
Public Record

Sarah W. Bailiff
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive
P. O. Box 961039
Fort Worth, TX 76161-0039
(817) 352-2354

Dated: February 27, 2003

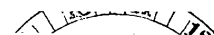
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FEB 26 2003

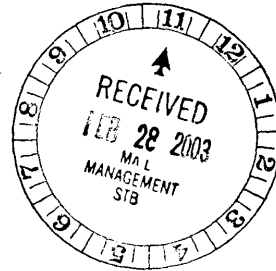
SURFACE
TRANSPORTATION BOARD

FILED

FEB 26 2003



BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 34316 (Sub. No. 1)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY--TRACKAGE RIGHTS EXEMPTION--
UNION PACIFIC RAILROAD COMPANY--
PLACEDO, TX TO KAMEY, TX

**PETITION FOR PARTIAL REVOCATION OF CLASS EXEMPTION AND FOR
TEMPORARY EXEMPTION OF TRACKAGE RIGHTS**

Pursuant to 49 U.S.C. § 10502(d) and the regulations of the Surface Transportation Board ("Board") at 49 C.F.R. § 1121, The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") hereby seeks partial revocation of the Board's trackage rights class exemption, 49 C.F.R. § 1180.2(d)(7), as necessary to allow a *portion* of a BNSF/UP trackage rights arrangement which is the subject of this proceeding to expire, as expressly desired by both parties. Granting a temporary exemption for a limited portion of BNSF's trackage rights and revoking the class exemption as necessary to allow that action is consistent with the rail transportation policy of 49 U.S.C. § 10101 and will promote efficient and competitive rail service.

DISCUSSION

In the Notice of Exemption filed February 20, 2003 related to this Petition and pursuant to 49 C.F.R. § 1180.2(d)(7), BNSF seeks to utilize trackage rights over UP's rail line from UP Milepost 14.2 at Placedo, TX to UP Milepost 6.95 at Kamey, TX, for a total distance of 7.25 miles ("Long Term Trackage Rights"). The purpose of the trackage rights is to allow BNSF access to a new line (the "Build-In Line") under construction from Kamey, Texas to the Dow Chemical Company (former Union Carbide Corporation) facility at North Seadrift, Texas (the

"Dow Facility").¹ In addition solely for the period of construction of the Build-In Line, BNSF will utilize temporary trackage rights from UP Milepost 15.4 on the Port Lavaca Subdivision and Placedo, TX, and between UP Milepost 6.0 and 6.95 on the Port Lavaca Subdivision ("Temporary Trackage Rights").

BNSF has sought, and UP has granted trackage rights to BNSF between Placedo, TX, and Kamey, TX, as described above. Subject to approval of the Board, the Long Term Trackage Rights will terminate at 11:59 p.m. (Omaha, NE time) on May 31, 2095. In contrast, the UP Temporary Trackage Rights on the Port Lavaca Subdivision as referenced above are solely for the purpose of facilitating construction of the Build-In Line, and as such are intended to lapse upon completion of the construction of the Build-In Line. Accordingly, we are requesting that the Temporary Trackage Rights portion be subject to this revocation exemption.

Trackage rights approved under the existing class exemption are normally indefinite regardless of a contract provision imposing a definite term. See, e.g., *Milford-Bennington Railroad Company, Inc. -- Trackage Rights Exemption -- Boston and Maine Corporation and Springfield Terminal Railway Company*, Finance Docket No. 32103 (ICC served September 3, 1993) at 2, dissent at 4, n.3. The trackage rights between BNSF and UP meet the criteria for class exemption under 49 C.F.R. § 1180.2(d)(7) because they are based on a written agreement and are not sought in response to any other application. Petitioners accordingly seek revocation of that class exemption to the extent necessary to allow the Board to exempt the Temporary Trackage Rights only until the time specified above (i.e., completion of construction, currently estimated for completion prior to the end of June, 2003). In the past, the Board's predecessor, the Interstate Commerce Commission, revoked the trackage rights class exemption at the request of the party seeking the trackage rights to allow a more individualized review of the proposed transaction. See, e.g., *Union Pacific Railroad Company and Missouri Pacific Railroad Company--Trackage Rights Over Lines of Chicago and North Western Transportation Company*

¹ Construction and operation of the Build-In Line was approved by the Board in Finance Docket No. 34003, by final decision served January 25, 2002.

Between Fremont, NE/Council Bluffs, IA and Chicago, IL, Finance Docket No. 31562 (ICC served November 30, 1989); *Southern Railway Company and Norfolk Southern Corporation -- Purchase -- Illinois Central Gulf Railroad Company Line Between Fulton, KY and Haleyville, AL*, Finance Docket No. 31088 (ICC served October 2, 1987). More recently, the Board has permitted the expiration of trackage rights agreements by a petition for revocation of class exemption and for temporary exemption of trackage rights. *Union Pacific Railroad Company -- Trackage Rights Exemption -- Chicago, Central & Pacific Railroad Company*, Finance Docket No. 32959 (STB served July 25, 1996); *Burlington Northern and Santa Fe Railway Company -- Trackage Rights Exemption -- Union Pacific Railroad Company*, (STB served April 24, 1998) Finance Docket No. 33574 (Sub-No. 1). In the decision in Finance Docket No. 32959, the Board stated that "[l]imiting the term of the trackage rights is consistent with the limited scope of the transaction previously exempted and will have no adverse impact on shippers on the line as the trackage rights are for overhead traffic only."

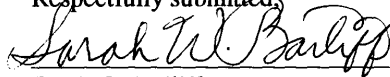
The proposed temporary trackage rights exemption is limited in scope and will not result in an abuse of market power. Shippers will not lose access to any rail service or competitive options already in existence. To the contrary, the Temporary Trackage Rights would help ensure that BNSF shippers achieve access to competitive rail service via the Build-In Line.

Under 49 U.S.C. § 10502, the Board must exempt a person, class of persons, or a transaction or service, in whole or in part, when the Board finds the following: (1) that continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either the transaction or service is of limited scope, or regulation is not necessary to protect shippers from the abuse of market power. 49 U.S.C. § 10502(a). Granting a temporary trackage rights exemption would promote the rail transportation policy of 49 U.S.C. § 10101 by ensuring that BNSF can continue to provide a sound rail transportation system with effective competition while repair and maintenance is performed on its main line. 49 U.S.C. § 10101(4), (5). The proposed transaction also promotes coordination between rail carriers and a thoughtful effort to efficiently manage existing rail assets. 49 U.S.C. § 10101(5), (9). A denial

of the requested temporary trackage rights exemption would be in contradiction to rail transportation policy because the parties are unlikely to reach any other feasible arrangement which would allow BNSF to operate over UP lines.

WHEREFORE, BNSF respectfully requests that the Board partially revoke the class exemption at 49 C.F.R. § 1880.2(d)(7) with respect to the Temporary Trackage Rights which are the subject of this proceeding and grant BNSF a temporary exemption for its trackage rights on UP's lines indicated herein, to expire effective as of the date construction of the Build-In Line is completed. BNSF requests that this revocation exemption be limited solely to the Temporary Trackage Rights that are the subject of this docket. The Long Term Trackage Rights referenced in this docket should remain in effect in accordance with applicable law without exemption revocation affecting the term thereof.

Respectfully submitted,

A handwritten signature in cursive script, reading "Sarah W. Bailiff", written over a horizontal line.

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