



Robert T. Opal
General Commerce Counsel

June 5, 2006

Via E-Filing

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

**Re: Finance Docket No. 34881; Union Pacific Railroad Company –
Trackage Rights Exemption – BNSF Railway Company**

Dear Secretary Williams:

This is in response to the "Petition for Stay" filed earlier today in the above proceeding by the UTU Committee of Adjustment. The Petition is directed at the notice of exemption covering UP's acquisition of 0.6 miles of trackage rights over BNSF in the Tacoma area which is scheduled to become effective on June 7.

The UTU petition in this proceeding is similar to a petition filed by UTU in Finance Docket No. 34880 on June 1. UP's reply to UTU's petition in the latter proceeding is fully applicable to UTU's instant petition, and is attached for ready reference.

Briefly, what UTU is complaining about in both proceedings is not the trackage rights which UP is acquiring. Rather, UTU is primarily complaining about so-called "agency agreements" to be made by BNSF with PNWR at Portland) and Tacoma Rail at Tacoma. For example, on p. 8 of its most recent petition, UTU claims only that "BNSF train service personnel will suffer irreparable injury in loss of work to Tacoma Rail". But it makes no claim that BNSF's grant of trackage rights in this docket will have any impact on BNSF employees.

Essentially, UTU is arguing is that the trackage rights in this proceeding should be stayed because they were granted in exchange for UP's consent to BNSF's use of Tacoma Rail to operate over other Tacoma area trackage owned by UP. As pointed out in our FD 34880 reply, it is very common for trackage rights to be granted by one carrier in return for trackage rights, consents or other privileges granted by the other carrier as to other lines. Often, individual grants of trackage rights, consents and privileges are part of exchanges involving line segments in multiple locations., which can be either in the same general area or separated by hundreds of miles. The existence of these quid-pro-quos does not mean that all of the various grants involved in such an exchange have to be considered in a single proceeding, as UTU seems to think, and there is nothing under the trackage rights notice of exemption rules that requires such handling. It's entirely appropriate for the parties to these exchanges to handle each of the transactions involved in these exchanges separately.

For the reasons stated above and in UP's June 2, 2006 reply in Finance Docket No. 34880, attached hereto, UP respectfully requests that UTU's Petition for Stay be denied.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert J. [unclear]", with a long horizontal flourish extending to the right.

cc: Person shown on Certificate of Service



Robert T. Opal
General Commerce Counsel

June 2, 2006

Via E-Filing

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

**Re: Finance Docket No. 34880; Union Pacific Railroad Company –
Trackage Rights Exemption – BNSF Railway Company**

Dear Secretary Williams:

Late yesterday (4:51 PM Washington DC time, June 1, 2006), UP received a copy of a "Petition for Stay" filed by the UTU Committee of Adjustment of the exemption scheduled to become effective today at 12:01 AM. For the following reasons, the UTU Petition is without merit and should be summarily denied.

- (1) The exemption is already effective (at 12:01 AM this morning), and so can no longer be stayed. UTU admits (at p. 3) that it was aware of the notice of exemption on Friday, May 26. For some reason, it did not request a copy from UP and waited until the afternoon of June 1 before submitting its petition (probably to deprive UP of an opportunity to reply).
- (2) The Petition does not show that the Notice of Exemption failed to comply in any way with the Board's requirements for a trackage rights notice of exemption.
- (3) UTU's principal argument is that the trackage rights are related to a BNSF/PNWR agency agreement (UTU, p. 4). But, the only relationship between the trackage rights and the agency arrangement is that, as partial consideration for the grant of trackage rights, UP will grant BNSF the right to allow PNWR the right to act as BNSF's agent between Portland, OR and Labish, OR, which was fully disclosed in the draft agreement filed with the Board. There is absolutely nothing improper about this. First of all, as the Board is well aware, trackage rights are very commonly granted by one carrier in return for trackage rights, consents or other privileges granted by the other carrier as to other lines. Secondly, UP is not seeking any Board authority for the BNSF-PNWR arrangement whatever it may be. If such an agreement is made, it will be between BNSF and PNWR. Third, there is nothing in the Board's trackage rights class exemption which makes the exemption unavailable where a grant of trackage rights over one line is in exchange for trackage rights, consents or other privileges granted as to other lines. The only exclusion from the exemption is for trackage rights "filed or sought in responsive applications in rail consolidation proceedings", 49 CFR 1180.2(d)(8), which is clearly not involved here.

- (4) UTU's secondary contention is that the draft agreement filed with the notice of exemption "has terms which have not yet been finalized" and has "missing terms" (UTU, p. 4). But the Board's rules do not require the filing of a fully finalized or complete agreement with a trackage rights notice of exemption. To the contrary, 49 C.F.R. 1180.6(a)(7)(ii)(Note 3) specifically states that a notice of exemption can be filed with "a draft contract or agreement...containing the **significant terms** proposed". The draft agreement submitted with the notice fully complied with this standard. Further, the final, executed agreement (filed with the Board on May 31) was identical to it. The "missing terms" UTU is complaining about are the "boilerplate" terms which appear in Exhibit B of most BNSF-UP trackage rights agreements. They aren't "significant terms" as that phrase is used in 1180.6(a)(7)(ii) because they don't define the line segment over which the rights are granted, the nature of the rights (overhead or local) or the compensation terms, all of which are covered in the draft agreement that was filed with the Board. Because of this, UP generally does not file "Exhibit B" when filing a notice of exemption with a draft agreement, but includes it with the final, executed copy, when it is filed. That is what was done here - Exhibit B was included with the final, executed copy of the agreement filed with the Board on May 31. The Board's staff has never objected to this practice, either in this or prior UP filings.
- (5) UTU's claims that the notice of exemption should be stayed because "BNSF train service personnel will suffer irreparable injury in loss of work to PNWR". This has nothing to do with the notice of exemption in this proceeding. It relates solely to the "agency agreement" between BNSF and PNWR to which UTU is objecting, which is not before the Board in this proceeding. Staying the trackage rights exemption will have no effect, one way or the other, on the BNSF-PNWR transaction. In the unlikely event that the trackage rights transaction involved in this proceeding would have any adverse affect on rail employees, the labor protective conditions imposed in Norfolk and W. Ry Co – Trackage Rights, 354 I.C.C. 605 (1978), as modified in Meddocino Coast Ry, Inc. - Lease and Operate, 360 I.C.C.C. 653 (1980) are available, as stated in the notice of exemption (p. 4). Significantly, UTU does not even discuss these labor protective conditions, much less make any claim that they are inadequate.

For the reasons stated above, UTU's petition for stay should be denied.

Sincerely,



cc: Person shown on Certificate of Service

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document on the persons listed below by fax or E-

Mail:

Sarah Whitley Bailiff, Esq.
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Dated at Omaha, Nebraska, this 5th day of June, 2006.


Robert T. Opal