

ORIGINAL

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Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34883

PORTLAND AND WESTERN RAILROAD, INC.--TRACKAGE
RIGHTS EXEMPTION--UNION PACIFIC RAILROAD COMPANY

PETITION FOR STAY^{*/}

ENTERED
Office of Proceedings

JUL 10 2006

Part of
Public Record

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

July 10, 2006

Attorney for John D. Fitzgerald

^{*/} Expedited handling requested inasmuch as the notice may become effective sometime after 12:01 AM, Sunday, July 16, 2006.

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34883

PORTLAND AND WESTERN RAILROAD, INC.--TRUCKAGE
RIGHTS EXEMPTION--UNION PACIFIC RAILROAD COMPANY

PETITION FOR STAY

Preliminary Statement

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), petitions for stay of operation of the notice of exemption, filed June 29, 2006, by Portland & Western Railroad, Inc. (PNWR), for PNWR to operate as agent for BNSF over BNSF's line between East Portland and Labish (Salem), OR, a distance of approximately 49.4 miles. (Agency Rights, Notice, Ex. 2). The BNSF East Portland/Labish line is by trackage rights over Union Pacific Railroad Company (UP).^{2/} The PNWR agency arrangement with BNSF also embraces two "Access Trackage" segments for PNWR, one over 0.22-mile of Portland Terminal Railroad Company (PTR) (Agency Rights, Notice, Ex. 3), and the other over UP's Willamette River Bridge (Agency

^{1/} General Chairman for United Transportation Union on lines of BNSF Railway Company, with offices at 400 E. Evergreen Blvd., Vancouver WA 98660.

^{2/} BNSF acquired trackage rights from UP's predecessor, Southern Pacific Transportation Company (SP), in 1994, (Notice Ex. 2).

Rights, Notice, Ex. 4). Collectively, the proceeding has been termed (Agency Rights).^{3/}

The amended UP/BNSF Oregon Trackage Rights Agreement,^{4/} whereby BNSF has trackage rights over the UP line between East Portland and Labish, provides that upon commencement of the PNWR agency operation, BNSF will cease operations over the line; however, if the PNWR ceases operations as BNSF's agent, BNSF is entitled to resume operations over the UP line on its own behalf. (Agency Rights, Ex. 2).

The Board should stay the operation of the notice of exemption until such time as the UTU/GO-386 petition to reject the notice and/or revoke the exemption is decided by the Board, or if necessary, until the various agreements underlying the railroad restructuring are made public, and any STB approvals or exemptions obtained.

Timeliness

This petition for stay is submitted on an expedited basis inasmuch as PNWR's filing was not made public at the Board until

^{3/} This term for the PNWR/BNSF proceeding was given by UP in F.D. No. 34880, UP Trackage Rights, Notice, Ex. 2.

^{4/} This is the first amendment to the Oregon Trackage Rights Agreement. (Agency Rights Ex. 2). The original agreement, dated May 24, 1994, was between UP's predecessor, Southern Pacific Transportation Company (SP), and BNSF's predecessor, Burlington Northern Railroad Company (BN) (Agency Rights, Ex. 2). It was noticed for exemption by the former ICC in Finance Docket No. 32526, Burlington Northern Railroad Company--Trackage Rights Exemption--Southern Pacific Transportation Company, 59 Fed. Reg. 33008 (June 27, 1994). The trackage rights were meant to facilitate local commuter rail operations. See: Docket No. AB-6 (Sub-No. 363X), Burlington Northern Railroad Company--Abandonment Exemption--in Washington County, OR (served December 5, 1994) (not printed).

late Thursday, June 29, 2006, immediately prior to the 4-day Independence Day holiday.

Although PNWR's notice did not give the public an exact date for consummation of the transaction, as required by Board rule,^{5/} PNWR may have intended the exemption to become effective July 6, 2006.^{6/} PNWR advises the transaction is subject to the Norfolk & Western conditions (Agency Access, Notice 5), which requires advance notice of 20 days to railroad employees. The transaction thus may not be consummated prior to July 16, and perhaps July 18, 2006.^{7/} The Board clearly may entertain petitions to stay operation of the exemption prior to consummation; moreover, petitioner believes the operation of an exemption may be stayed thereafter, should such be necessary.

Background

The PNWR/BNSF agency arrangement is part of a restructuring of railroad operations between Seattle, WA and Eugene, OR, involving at least six rail carriers.^{8/} Thus far, some four consecu-

^{5/} 49 CFR 1180.4(g)&(g)(2).

^{6/} PNWR's notice stated "Consummation of the transaction will occur on the effective date of this notice." (Notice 4). This is misleading for the public. The PNWR notice was dated June 27. The public is unaware that the filing date in Washington, DC triggers a 7-day effective date for the notice, or even that the notice was ever filed; it is unreasonable to expect the public to contact the Board to ascertain when a notice was filed, or when the notice becomes effective. In actual fact, the notice was not received at the STB until June 29.

^{7/} For the BNSF Norfolk & Western notice, see: V.S. Fitzgerald, Appendix 1, pp. 1-2 (June 26), amended, Appendix 1, p. 3 (June 28).

^{8/} These carriers are BNSF, UP, PNWR, PTR. Tacoma Rail, and Longview Switching Company (LSC).

tively-numbered proceedings have been instituted, Finance Docket Nos. 34880, 34881, 34882, and 34883.

The instant PNWR agency for BNSF's operation between East Portland and Labish (Finance Docket No. 34883) (Agency Rights) is stated to be related to UP trackage rights over BNSF between Portland and North Portland Jct., OR. (Agency Rights, Notice Ex. 2, penultimate para.). These same UP East Portland/North Portland Jct. trackage rights were the subject of Finance Docket No. 34880, Union Pacific Railroad Company-Trackage Rights Exemption-BNSF Railway Company, 71 Fed. Reg. 34416 (June 14, 2006) (UP Trackage Rights). The Notice of Exemption in UP Trackage Rights made reference to the forthcoming Agency Rights proceeding.^{9/}

The STB Chairman, in his June 2, 2006 decision denying a stay for UP Trackage Rights, indicated that UTU/GO-386 could challenge any BNSF/PNWR attempt in Agency Rights to enter into an agreement requiring STB approval. UP Trackage Rights, 2 (Chmn. Buttrey, served June 5, 2006):

Should BNSF attempt to enter into an agreement with PNWR that would require Board authorization, then UTU/GO-386 properly may challenge that agreement at that time.

UTU/GO-386 challenges the PNWR/BNSF agency agreement, particularly in that the PNWR/BNSF agency agreement is not within the scope of the trackage rights class exemption, and lies outside the Board's authority under 49 U.S.C. 11323(a)(6).

^{9/} Finance Docket No. 34880, UP Trackage Rights, Ex. 2, p.1).

REASONS FOR STAY

The Board should stay the operation of PNWR's notice of exemption, for the following reasons, among others.

I. UTU/GO-386 HAS A HIGH PROBABILITY OF SUCCESS THAT AGENCY RIGHTS ARE NOT WITHIN THE CLASS EXEMPTION AND ARE OUTSIDE 49 U.S.C.11323.

UTU/GO-386 has a high probability of success on its claim that the Board will reject or revoke PNWR's notice/exemption as not within the trackage rights class exemption and outside the scope of 49 U.S.C. 11323(a)(6).

1. Contract Carrier. A rail common carrier may have its duties performed by an independent entity. U.S. v. Fruit Growers Ex. Co., 279 U.S. 363 (1929). Although the rail common carrier may employ an agent, the agent does not ipso facto become a common carrier. Terminal Allowance at Minnesota Transfer, 268 I.C.C. 15, 18 (1946). PNWR, as an agent of BNSF, is not itself a common carrier on the UP's line between East Portland and Labish. PNWR is solely an agent for BNSF. PNWR does not deal directly with the public in moving BNSF cars in overhead service on this trackage. PNWR issues no tariffs of its own. PNWR does not possess a certificate or exemption under 49 U.S.C. 10901 to operate on the trackage. At best, PNWR is a contract carrier for BNSF on the trackage,

PNWR may not invoke the trackage rights class exemption. A carrier under 49 U.S.C. 11323(a)(6) must a common carrier, particularly inasmuch as ICCTA defines "rail carrier" as "common carrier." 49 U.S.C. 10102(5). PNWR as a contract carrier, at best, does not qualify, in its own right, to invoke the trackage rights class exemption. Noteworthy, PNWR has not filed its agency agree-

ment with BNSF in this proceeding, even assuming, incorrectly and arguendo, that the PNWR/BNSF agreement may be subject to regulation; indeed, PNWR is not even a party to the BNSF/UP Oregon Trackage Rights Agreement, as amended. (Agency Rights, Ex. 2).

2. Discontinuance of Service. The provisions of the amended Oregon Trackage Rights Agreement providing for the cessation of BNSF operations upon commencement of the PNWR agency, would ordinarily require prior abandonment/discontinuance authority under 49 U.S.C. 10903. However, abandonment/discontinuance is not actually intended. BNSF would remain the actual common carrier in dealing with the shipping public, and in undertaking the usual common carrier responsibilities. Accordingly, PNWR cannot be deemed to acquire and operate BNSF's line under 49 U.S.C. 10902.

3. Pooling. The PNWR/BNSF agency agreement cannot be construed as a pooling arrangement under 49 U.S.C. 11322. PNWR does not have its own line between East Portland and Labish, and the notice of exemption does not otherwise qualify as a pooling agreement. Cf. Simmons v. ICC, 808 F.2d 22 (7th Cir. 1986).

4. Labor Relations Ploy. The real purpose of the PNWR/BNSF agency agreement is with respect to labor relations. BNSF desires that PNWR crews work BNSF traffic. This is clear from the verified statement of John D. Fitzgerald. the exchange of correspondence with BNSF in Appendix 2, in particular.

In short, rather than bargain with UTU/GO-386 over the proposal to utilize PNWR crews, BNSF seeks to supersede the Railway Labor Act by invoking the trackage rights class exemption

for its agency arrangement.^{10/} The trackage rights class exemption cannot be utilized for such bogus and sham tactics. The Board should reject the PNWR notice as not bona fide, and to protect the integrity of the agency processes. Minnesota Comm. Ry., Inc.-Trackage Exempt.-BN RR. Co., 8 I.C.C.2d 31, 37 (1991); Land Conservancy-Acq. & Oper.-Burlington Northern, 2 S.T.B. 673, 676 (1997).

II. RAILROAD EMPLOYEES WILL SUFFER IRREPARABLE INJURY WITHOUT A STAY.

Railroad employees will suffer irreparable injury without a stay of the operation of the exemption. Some two crews, embracing six employees, will be immediately eliminated, as even BNSF concedes. (V.S. Fitzgerald, Appendix 1, p. 2). There will be a very severe impact on BNSF employees, with considerable dislocation owing to exercise of seniority. (V.S. Fitzgerald, 2).

BNSF's statement that no one is expected to be adversely affected is preposterous. (V.S. Fitzgerald, Appendix 1, p. 2).

Apart from immediate job losses, the exercise of seniority will result in diminished earnings and less desirable alternate work.

The Norfolk & Western conditions are not a sufficient answer for protection. Remedies under RLA are far more preferable.

The employee injury is particularly irreparable. If UTU/GO-386 ultimately prevails in setting aside PNWR's claimed STB trackage rights authority, with the job positions restored, the

^{10/} To be sure, it is PNWR which has attempted to invoke the STB's jurisdiction; but UTU/GO-386 does not overlook PNWR's special counsel in this task.

employees cannot be fully compensated for economic and social damages occasioned during the interim PNWR agency operation.

III. PNWR WILL NOT BE INJURED
IF THE TRANSACTION IS STAYED.

PNWR will not be injured if a stay is granted pending the disposition of the UTU/GO-386 petition to reject/revoke. This would be new business for PNWR. Nothing would be taken away from PNWR if its contract operation with BNSF is stayed.

IV. THE PUBLIC INTEREST WARRANTS A STAY.

The public interest strongly supports a stay of the operation of the exemption. BNSF is attempting to circumvent the RLA by contracting with PNWR to have PNWR crews substitute for BNSF crews on BNSF traffic.

The public has an interest in orderly labor-management relations. The public interest in the proper administration of the RLA should be vindicated over efforts to circumvent the RLA by a bogus attempt to have an agency agreement placed under the STB's trackage rights class exemption.

CONCLUSION

The Board should stay the operation of the PNWR notice of exemption pending disposition of UTU/GO-386's petition to reject/revoke, or until further order of the Board.

Respectfully submitted,


GORDON P. MacDOUGALL

1025 Connecticut Ave., N.W.
Washington DC 20036

July 10, 2006

Attorney for John D. Fitzgerald

Certificate of Service

I hereby certify I have served a copy of the foregoing by personal service upon counsel for applicant, Sidney L. Strickland Jr., 3050 K St., N.W.-#101, Washington DC 20007-5108.

Washington DC


Gordon P. MacDougall

VERIFIED STATEMENT
OF JOHN D. FITZGERALD

My name is John D. Fitzgerald, with offices at 400 East Evergreen Boulevard, Vancouver, WA 98660. I serve as General Chairman for United Transportation Union-General Committee of Adjustment 386 (UTU/GO-386), for lines of BNSF Railway Company (BNSF).

I have read the notice of exemption for the instant Finance Docket No. 34883 (Agency Rights), filed June 29, 2006, by Portland and Western Railroad, Inc. (PNWR), for PNWR to acquire by assignment from BNSF, trackage rights over the line of Union Pacific Railroad Company (UP), between East Portland and Labish (Salem), OR, a distance of approximately 49.4 miles. The overhead trackage rights are for the sole purpose for PNWR to serve as BNSF's agent, and include the right to access UP's line (1) via Portland Terminal Railroad Company (PTR) for apx. 0.22 mile, and (2) via UP's Willamette River Bridge.

As stated in the instant PNWR notice of exemption, the PNWR agency rights are related to an agreement between UP and BNSF, for UP to be accorded overhead trackage rights on BNSF's line between Portland and North Portland Jct., OR. (Agency Rights, Notice Ex. 2, penultimate para.). The UP trackage rights, which extend for 7.41 miles, were filed May 26, and noticed June 14, 2006, in Finance Docket No. 34880, Union Pacific Railroad Company-Trackage Rights Exemption-BNSF Railway Company(UP Trackage Rights). I submitted a verified statement in opposition to the UP trackage rights, and pointed to the forthcoming related PNWR agency rights

between Portland and Labish. However, the STB's Chairman denied my petition for stay of the UP trackage rights, and said the PNWR/-BNSF agency rights agreement could be challenged if and when filed. UP Trackage Rights (Chmn. Buttrey, 6/5/06, at p. 2).

A copy of the PNWR/BNSF agency agreement is not included in the instant Agency Rights notice of exemption, and I have not seen the agreement. I do not know whether it is in writing. However, the amendment to the Oregon Trackage Rights Agreement, which is included in the Agency Rights notice of exemption, provides that BNSF will cease operations over its line between East Portland and Labish, except that BNSF may continue to use the UP trackage to interchange trains with PNWR at Willsburg Jct., OR.

The proposed PNWR agency rights will have a severe impact upon BNSF employees. A minimum of two crews, involving 6 positions, will be abolished. These are considered desirable positions, and generally are held by more senior employees, such that the impact of the abolishment will adversely affect many others through the successive exercise of seniority. Attached as my Appendix 1 is the June 26, 2006 Norfolk & Western notice issued by BNSF, which confirms the abolishment of the 6 positions. I strongly disagree with BNSF labor relations that no one will be adversely affected. There will be a very severe impact. Present BNSF employees have insufficient work.

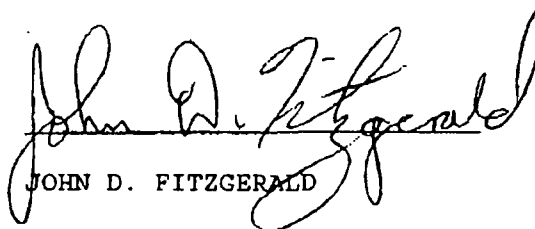
BNSF has not announced a date for consummation of the PNWR agency operation. The 20-day Norfolk & Western period in Appendix 1 would allow implementation on July 16; however, BNSF served an amendment to its notice, two days later, on June 28, 2006.

I consider the instant PNWR agency rights to constitute a unilateral change by BNSF in its collective bargaining agreement with UTU, and in violation of the Railway Labor Act (RLA) by not following the procedures required by the RLA. My appendix 2, consisting of two pages, is the June 1 and June 2 exchange of correspondence with M.H. Siegele on this matter. My organization considers BNSF intent to utilize PNWR crews as BNSF's agent to be unacceptable; moreover, the actual PNWR agency rights notice of exemption, filed with the STB subsequent to Mr. Siegele's June 1 letter, embraces BNSF cars as well as PNWR cars.

VERIFICATION

STATE OF WASHINGTON)
COUNTY OF CLARK)

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


JOHN D. FITZGERALD

Dated at
Vancouver WA
July 7, 2006

JUN. 26. 2006 11:29AM

BNSF LABOR RELATIONS

NO. 718

P. 1

2/3



Wendell Bell
General Director
Labor Relations

BNSF Railway Company
P.O. Box 981030
Ft. Worth, TX 76181-0030
2800 Lou Menk Dr. OOB-G/L
Ft. Worth, TX 76181-2800
phone: 817 352 1028
fax: 817 352 7482
mobile: 817 898 8428
wendell.bell@bnsf.com

June 26, 2006

REGISTERED MAIL - RETURN RECEIPT REQUESTED

Mr. John Fitzgerald, GC
UTU

Mr. Dennis Pierce, GC
BLETD-IBT

Gentlemen:

This is a notice, under Section 4 of the Norfolk & Western Conditions, of trackage rights operations in the northwestern area of Oregon.

Portland & Western (PNWR) either has or soon will be granted the following trackage rights:

1. Over BNSF between MP 10 (on the Fallbridge Sub; MP 136.5 on the Seattle Sub) at Vancouver, Washington to Lake Yard MP 0.69 (Main Track 1) or MP 0.91 (Main Track 2) at Portland, Oregon.
2. Over Portland Terminal (PTR) between MP 0.69 (Main Track 1) or MP 0.91 (Main Track 2) at Lake Yard and end of PTR ownership at MP 0 at Portland, Oregon.
3. Over Union Pacific between Portland MP 0.0 and East Portland MP 0.2 (equivalent of MP 770.2 on UP's Brooklyn Sub)
4. Over Union Pacific between East Portland MP 770.2 and Labish, Oregon MP 720.9

In the latter three arrangements, PNWR has been granted the right to act as BNSF's agent. All that this means is that PNWR has not been granted trackage rights separate and apart from those that BNSF has had. Rather, non-assignment restrictions in the trackage rights agreements that BNSF was party to have now been modified to allow PNWR to make the movement in question.

What all this will allow is for PNWR to take traffic from Portland - Vancouver and bring it down to the PNWR operation at Albany and bring traffic from the PNWR operation between Albany and Salem to Portland - Vancouver. The result will be the abolishment of the two 6-day locals that BNSF has been

JUN 26 2006

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BNSF LABOR RELATIONS

NO. 718

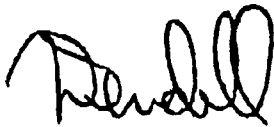
P. 2

3/3

operating to bring and take these cars between Portland - Vancouver and Albany. While there will, then, be 6 job abolishments (2 engineers, 2 conductors, 2 brakemen), I am advised that no one is expected to be adversely affected, in that there are immediate needs for the incumbents to protect other assignments in the Portland - Vancouver terminal. Also, since these are trackage rights arrangements being submitted to the Surface Transportation Board, we fully expect that the STB will impose the employee protections of the *Norfolk & Western* Conditions.

If further handling is needed, please contact me.

Sincerely,





Wendell Bell
General Director
Labor Relations

BNSF Railway Company
P.O. Box 961030
Ft. Worth, TX 76161-0030
2600 Lou Menk Dr. DOB-GL
Ft. Worth, TX 76131-2800
phone: 817 352 1028
fax: 817 362 7482
mobile: 817 939 8429
wendell.bell@bnsf.com

June 28, 2006

REGISTERED MAIL – RETURN RECEIPT REQUESTED

Mr. John Fitzgerald, GC
UTU

Mr. Dennis Pierce, GC
BLETD-IBT

Gentlemen:

This is a slight amendment of our June 26 notice, under Section 4 of the Norfolk & Western Conditions, of trackage rights operations in the northwestern area of Oregon.

Portland & Western (PNWR), in addition to the other trackage rights specified in the June 26 notice, will also be granted trackage rights from MP 136.5 to MP 132.5 on the Seattle sub.

What this will allow is for PNWR to pick up or leave its train in the Vancouver Yard. There will be no employees affected by this grant of trackage rights beyond those specified in the June 26 notice. Nevertheless, since these are trackage rights arrangements being submitted to the Surface Transportation Board, we fully expect that the STB will impose the employee protections of the *Norfolk & Western* Conditions.

If further handling is needed, please contact me.

Sincerely,

JUL 05 2006

nttrpnwr60626a/6.28.06

J. D. FITZGERALD
General Chairman

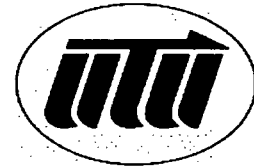
The Academy, Suite 217
400 East Evergreen Blvd
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Telephone: (360) 694-7491
Fax: (360) 694-2049
E-mail: JDFITZ386@aol.com

united transportation union

GENERAL COMMITTEE of ADJUSTMENT GO-386

*Burlington Northern Santa Fe Railroad, Montana Western Railroad,
Colorado and Southern Railroad and Portland and Puget Sound Railroad*



Of Counsel
M. M. WINTER
G.O. HARTSOCK

Fax (817) 352-7319
And U.S. Mail

June 1, 2006

M.H. Siegele, Jr.
Asst. Vice President - Labor Relations
BNSF Railway Company
P.O. Box 961030
Ft. Worth, TX 76161-0030

Re: Finance Docket No. 34880
BNSF's referenced designation of
Portland and Western RR as an "Agent"

Dear Sir:

In regard to the above reference, the identified Finance Docket No. 34880 states in part in Exhibit 2:

"Whereas, UP will enter into a separate supplement agreement with BNSF of even date granting the BNSF the right to allow the Portland and Western RR, Inc. ("PNWR") to act as BNSF's agent between Portland, OR and Labish, OR ("Agency Rights") and ..."

If it is BNSF's intention to utilize "agent" PNWR crews to man and operate BNSF trains between Albany, OR (Labish, OR) and Portland, OR, this will serve as notice that BNSF has unilaterally changed Collective Bargained Agreements and working conditions.

BNSF does not have the authority or CBA provisions that would allow BNSF to "contract" operation of BNSF trains to another entity or "agent." Such handling is a violation of the Railway Labor Act, as amended, and will not be tolerated.

Request prompt written and faxed response detailing BNSF's intentions.

Sincerely,



J. D. Fitzgerald
General Chairman

JDF/aas

cc: P.C. Thompson
C.J. Miller, III
✓ G.P. MacDougall
W.A. Bell
R.L. Luther

APPENDIX 2
Page 1 of 2

JUN. 2. 2006 4:16PM

BNSF LABOR RELATIONS

NO. 636

P. 1

3/3



Milton Siegel
Assistant Vice President
Labor Relations

BNSF Railway Company
2800 Lou Mark Drive OOB-GJ
Fort Worth, TX 76131
(817) 352-1080
(817) 352-7310
milton.siegel@bnsf.com

Via Fax and U.S. Mail

June 2, 2006

J.D. Fitzgerald, General Chairman
United Transportation Union
The Academy, Suite 217
400 East Vancouver, WA 98660

Dear Mr. Fitzgerald:

I am responding to your letter dated June 1, 2006 concerning your inquiry as to whether BNSF Railway intends to, "utilize 'agent' PNWR crews to man and operate BNSF trains between Albany, OR (Labish, OR) and Portland, OR...."

BNSF does have an agreement with UP to utilize PNWR crews as our agent over Union Pacific (UP) track (for which we have overhead trackage rights) to handle PNWR cars between Albany and Portland. But we have not implemented that agreement yet. The agreement with UP is just the first step in the process, and we may decide not to move forward. However, if we do move forward, nothing will happen before July 1, 2006.

Going forward, we will make any necessary public filings with the Surface Transportation Board and keep both UTU and BLET apprised of the situation.

Randy Luther has scheduled a meeting with you, General Chairman Pierce, and Wendell Bell to discuss this matter in further detail on June 12, 2006. We look forward to seeing you on June 12, and in the meantime, let me know if you have any questions.

Sincerely,

cc: Dennis Pierce