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October 28, 2008

VIA ELECTRONIC FILING

Ms. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: **Finance Docket No. 35045**
Duluth, Winnipeg and Pacific Railway Company -- Amended Trackage Rights Exemption -- Duluth, Missabe and Iron Range Railway Company

Finance Docket No. 35046
Duluth, Missabe and Iron Range Railway Company -- Amended Trackage Rights Exemption -- Duluth, Winnipeg and Pacific Railway Company

Finance Docket No. 35047
Wisconsin Central Ltd. -- Trackage Rights Exemption -- Duluth, Missabe and Iron Range Railway Company

Finance Docket No. 35048
Wisconsin Central Ltd. -- Trackage Rights Exemption -- Duluth, Winnipeg and Pacific Railway Company

Finance Docket No. 35049
Duluth, Missabe and Iron Range Railway Company -- Trackage Rights Exemption -- Wisconsin Central Ltd.

Finance Docket No. 35050
Duluth, Winnipeg and Pacific Railway Company -- Trackage Rights Exemption -- Wisconsin Central Ltd.

Dear Secretary Quinlan:

Attached for filing in the above-captioned proceedings is the **Reply to United Transportation Union's Petition to Revoke Exemptions**, dated October 28, 2008.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,

Thomas J. Litwiler
Attorney for Duluth, Missabe and Iron Range Railway Company, Duluth, Winnipeg and Pacific Railway Company and Wisconsin Central Ltd.

TJL:tl

Attachment

cc: Daniel R. Elliott, III, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35045

DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY
-- AMENDED TRACKAGE RIGHTS EXEMPTION --
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

FINANCE DOCKET NO. 35046

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY
-- AMENDED TRACKAGE RIGHTS EXEMPTION --
DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY

FINANCE DOCKET NO. 35047

WISCONSIN CENTRAL LTD.
-- TRACKAGE RIGHTS EXEMPTION --
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

FINANCE DOCKET NO. 35048

WISCONSIN CENTRAL LTD.
-- TRACKAGE RIGHTS EXEMPTION --
DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY

FINANCE DOCKET NO. 35049

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
WISCONSIN CENTRAL LTD.

FINANCE DOCKET NO. 35050

DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
WISCONSIN CENTRAL LTD.

REPLY TO UNITED TRANSPORTATION UNION'S
PETITION TO REVOKE EXEMPTIONS

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Dated: October 28, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35045

DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY
-- AMENDED TRACKAGE RIGHTS EXEMPTION --
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

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FINANCE DOCKET NO. 35050

DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
WISCONSIN CENTRAL LTD.

REPLY TO UNITED TRANSPORTATION UNION'S
PETITION TO REVOKE EXEMPTIONS

Duluth, Missabe and Iron Range Railway Company ("DMIR"), Duluth, Winnipeg and Pacific Railway Company ("DWP") and Wisconsin Central Ltd. ("WCL" and, collectively with DMIR and DWP, "CN") hereby reply to the July 16, 2007 petition of the United Transportation Union ("UTU") to revoke the trackage rights class exemptions in these six related dockets. The exemptions became effective on July 14, 2007, prior to the filing of the UTU Petition, and were not subject to stay requests by UTU or any other party.[1] In its three-paragraph petition, UTU argues that these trackage rights transactions are not subject to the Board's jurisdiction because they occurred among corporate affiliates -- an argument expressly rejected by the Board in identical circumstances more than a decade ago.

BACKGROUND

DMIR, DWP and WCL are each indirect subsidiaries of Canadian National Railway Company ("CNR"). See Canadian National Ry. Co. -- Control -- Wisconsin Central Transp. Corp., 5 S.T.B. 890 (2001) (CN control of WCL); Canadian National Railway Company and Grand Trunk Corporation -- Control -- Duluth, Missabe and Iron Range Railway Company, et al., Finance Docket No. 34424 (STB served April 9, 2004) ("CN/GLT") (CN control of DMIR).[2] DMIR and DWP operate largely parallel lines extending north toward Canada from the Twin Ports of Duluth, Minnesota and Superior, Wisconsin. A primary WCL line extends south

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[1] In order to accommodate negotiations between the parties, proceedings on the UTU Petition were held in abeyance pursuant to serial decisions in all six dockets served August 15, 2007, October 11, 2007, December 14, 2007, February 14, 2008, April 17, 2008, July 3, 2008 and August 15, 2008. Negotiations have not been successful, and by decision served October 27, 2008, the Board (at CN's request) set October 28, 2008 as the due date for CN's reply to the UTU Petition. The CN trackage rights exemptions remain effective, and CN has the continuing right to consummate the transactions.

[2] DWP has been controlled by CN for decades. CN's U.S. rail subsidiaries, including DMIR, DWP and WCL, are held by Grand Trunk Corporation ("GTC"), a wholly-owned direct subsidiary of CNR, and report to the Board on a consolidated basis under the GTC name.

from the Twin Ports through Fond du Lac, Wisconsin to Chicago. The lines of WCL and DMIR/DWP meet at South Itasca, Wisconsin, just south of the Twin Ports; WCL has existing trackage rights over the DMIR/DWP line from South Itasca to DWP's Pokegama Yard in Wisconsin, where traffic between the carriers is currently exchanged.[3]

Pursuant to the notice of exemptions filed in these six dockets, DMIR, DWP and WCL proposed to exchange overhead trackage rights with each other on either side of the Twin Ports, to allow more efficient operations and better crew utilization. In Finance Docket Nos. 35047 and 35048, respectively, WCL would receive overhead trackage rights on DMIR from South Itasca through Pokegama and Nopeming Junction to Shelton Junction, Minnesota and on DWP from Nopeming Junction through Shelton Junction to Ranier, Minnesota.[4] In Finance Docket Nos. 35049 and 35050, respectively, DMIR and DWP would receive overhead trackage rights on WCL from South Itasca to Fond du Lac, Wisconsin, a major WCL yard facility.

As explained in the attached verified statement of Mark Hightower, CN's Superintendent in the region encompassing the Twin Ports, the purpose of these reciprocal trackage rights grants is to provide better crew utilization by allowing DMIR/DWP trains to operate south of Pokegama Yard and WCL trains to operate north of Pokegama, in those instances where crews arrive at Pokegama Yard and have remaining service hours that otherwise

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[3] See Wisconsin Central Ltd. -- Exemption -- Trackage Rights -- Duluth, Missabe and Iron Range Railway Company, Finance Docket No. 31265 (ICC served May 5, 1988); Wisconsin Central Ltd. -- Trackage Rights Exemption -- Over Duluth, Missabe and Iron Range Railway Company, Finance Docket No. 31881 (ICC served June 6, 1991).

[4] DMIR and DWP have the ability to operate on a paired track basis between Nopeming Junction and Shelton Junction, with each carrier having overhead trackage rights on the other carrier's parallel line. See CN/GLT at 19-20. The current notices of exemption in Finance Docket Nos. 35045 and 35046 relate to minor modifications to the existing trackage rights agreements between DMIR and DWP on these line segments, and are largely incidental to the new trackage rights proposed in the other four pending dockets.

would be wasted. Hightower V.S. at 1-2. DMIR, DWP and WCL crews will each remain subject to their respective collective bargaining agreements at all times.[5] Apart from extending each carrier's operating district through -- rather than simply to -- the Twin Ports, the proposed trackage rights will not result in any modification or diminution of any existing collective bargaining agreement. Hightower V.S. at 3. Because the rights are reciprocal, it is expected that existing work levels for employees will remain generally even -- i.e., that WCL crews operating north of the Twin Ports on the DMIR/DWP lines will be balanced by DMIR/DWP crews operating south of the Twin Ports on the WCL line. Hightower V.S. at 4. As each of the six notices of exemption served by the Board on June 29, 2007 provides, any employees who are adversely affected by the transactions would be protected by the conditions imposed in Norfolk and Western Ry. Co. -- Trackage Rights -- BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc. -- Lease and Operate, 360 I.C.C. 653 (1980).

UTU filed its cursory petition to revoke all six trackage rights exemptions on July 17, 2007. While UTU indicated that it "intends to engage in discovery," UTU Petition at 2, it has not done so.

DISCUSSION

UTU argues that the Board has no jurisdiction over the subject trackage rights pursuant to 49 U.S.C. § 11323 because the transactions occur among commonly-controlled carriers. UTU Petition at 1. The Board has already specifically addressed and expressly rejected such an argument:

> [UTU's] arguments that this transaction is not subject to our jurisdiction are without merit. Despite their affiliation, these

[5] There currently are separate collective bargaining agreements in place at each of DMIR, DWP and WCL. UTU represents trainmen on DMIR and WCL, and both engineers and trainmen on DWP.

> carriers could not have lawfully instituted this trackage rights arrangement absent our approval under [former] 49 U.S.C. 11343(a)(6) or our grant of an exemption from that provision pursuant to [former] 49 U.S.C. 10505(a).

Missouri Pacific Railroad Company -- Trackage Rights Exemption -- Union Pacific Railroad Company, Finance Docket No. 32656 (STB served May 17, 1996) ("MP/UP Trackage Rights") at 4; see also Norfolk Southern Railway Company -- Trackage Rights Exemption -- Norfolk and Western Railway Company, Finance Docket No. 32661 (STB served February 21, 1996) ("NS/N&W Trackage Rights") at 3 (same).

MP/UP Trackage Rights and NS/N&W Trackage Rights were each nearly identical to the instant proceedings: a rail carrier granted trackage rights to its corporate affiliate for purposes of improving operational efficiency. See MP/UP Trackage Rights at 4 (noting "substantial operating efficiencies that may be achieved by the transaction."); NS/N&W Trackage Rights at 1, 4 (noting that "there is a valid commercial reason for the transaction," which permitted "seamless, run-through service" through an existing terminal). UTU opposed both of those transactions on the same grounds that it asserts here. The Board rejected UTU's claims, finding that UTU had not satisfied the criteria for revocation under what is now 49 U.S.C. § 10502(d). See, e.g., I&M Rail Link, LLC -- Acq. & Oper. Exem. -- Canadian Pacific Ry., 2 S.T.B. 167, 174 (1997) (party seeking revocation bears burden of proof, and must present "reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary."), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998).

Indeed, the trackage rights transactions proposed in the instant dockets should cause even less concern than those in MP/UP Trackage Rights and NS/N&W Trackage Rights, since CN's intra-corporate trackage rights here are reciprocal and will generally balance out

changes in work levels for DMIR, DWP and WCL crews. The trackage rights in MP/UP Trackage Rights and NS/N&W Trackage Rights extended in one direction only, and indisputably reduced the work performed by one carrier's crews and increased the work performed by the other. The Board nonetheless rejected the argument that those trackage rights were a "sham," finding instead that they served a legitimate transportation purpose. The same conclusion is required here as well.

It is neither the purpose nor the effect of the proposed trackage rights transactions to avoid the existing DWP, DMIR or WCL collective bargaining agreements, or to prefer one collective bargaining agreement over another. Hightower V.S. at 3. While the DMIR, DWP and WCL agreements are not identical, the trackage rights are not expected to significantly alter the total amount of work performed under each agreement. All DMIR, DWP and WCL employees will remain subject to their own collective bargaining agreements at all times. If there is any incidental net loss of work for employees, they will be protected by the Norfolk & Western labor protective conditions imposed on these transactions.

As Mr. Hightower explains, the purpose of the trackage rights is to provide greater operating flexibility, better crew utilization and reduced train delays in the Twin Ports and surrounding area. Hightower V.S. at 2-3. They are restricted to overhead traffic, and any local switching service will continue to be provided by the home road's employees. Hightower V.S. at 3-4. UTU has not alleged, let alone demonstrated, that the proposed trackage rights are motivated by or seek to capitalize on differences in the DMIR, DWP and WCL collective bargaining agreements. They instead arise from legitimate and obvious operating efficiencies that can be obtained through better utilization of crews -- under whatever collective bargaining agreement may apply.

This case has nothing to do with the issues in Canadian National Railway Company -- Contract to Operate -- Grand Trunk Western Railroad Inc. and Duluth, Winnipeg & Pacific Railway Company, Finance Docket No. 32640 (ICC served April 18, 1995) ("CN/GT"), which is the sole precedent of any kind cited by UTU as support for its position. UTU Petition at 2. There, the former Interstate Commerce Commission found that a proposed "contract to operate" another railroad was not, in fact, a contract to operate within the meaning of former 49 U.S.C. § 11343(a)(2) where the putative operating railroad would conduct no new operations over the operated railroad. CN/GT at 3 (under proposal, "no change in control of operations would seem to be effectuated," and "the underlying operating plan raises significant doubt that CN ever would actually operate the GT properties."). Here, the applicants plainly propose and intend to conduct actual overhead trackage rights operations on each other's lines, and explicit precedent (postdating the CN/GT decision) makes clear that such intracorporate trackage rights transactions are subject to the Board's jurisdiction. MP/UP Trackage Rights and NS/N&W Trackage Rights, supra.[6]

[6] Apparently hinting at an alternate theory of relief, UTU also makes the bald claim that the DMIR, DWP and WCL notices of exemption are "false and misleading." UTU Petition at 1. Each of the notices accurately describes the proposed trackage rights, states the purpose to "enhance operational efficiency," and specifically discloses the common control relationship among the parties. UTU does not and cannot identify any manner in which the notices are false or misleading.

WHEREFORE, DMIR, DWP and WCL respectfully request that UTU's petition to revoke the exemptions in these proceedings be denied.

Respectfully submitted,

By:_____

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ATTORNEYS FOR DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY, DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY AND WISCONSIN CENTRAL LTD.

Dated: October 28, 2008

VERIFIED STATEMENT
OF
MARK HIGHTOWER

My name is Mark Hightower. I am Superintendent-CN based at Stevens Point, Wisconsin, a position I have held since March, 2007. I am responsible for overseeing all operations on the CN rail system in northern Minnesota and northern Wisconsin, including all lines of CN affiliates Duluth, Winnipeg & Pacific Railway Company ("DWP") and Duluth, Missabe and Iron Range Railway Company ("DMIR"), and the line of Wisconsin Central Ltd. ("WCL") between Superior and Stevens Point, Wisconsin. I am familiar with the intracorporate trackage rights among DWP, DMIR and WCL that are the subject of these proceedings, having participated in the internal analysis that led to the trackage rights agreements involved. Although all of the trackage rights exemptions have become effective, CN has not yet implemented the trackage rights operations covered under the exemptions.

CN rail system operations in the Duluth, Minnesota/Superior, Wisconsin area are unique among railroads in the region in that three different affiliates of CN have lines into this area. Though these railroads are now operated under common control, historical operating patterns among these railroads inhibit operating flexibility and efficiency. The purpose of these intracorporate trackage rights is to improve the efficiency and timeliness of CN operations in the Duluth/Superior area by providing greater operating flexibility, better utilization of crews and reduced train delays.

For example, today the crew on a southbound DWP train often arrives at DWP's terminal at Pokegema Yard in Superior with hours of service remaining. DWP crews often make the run from Ranier, Minnesota (the north end of DWP operations) to Pokegema Yard (the south end of DWP operations) in six hours. (DWP trains enter Pokegema Yard via existing trackage

rights over a DMIR line between Nopeming Junction near Duluth and Pokegama Yard. That DMIR line continues to a connection with WCL at South Itasca (Superior), Wisconsin). Historically, DWP did not have operating rights over WCL's line south of Superior. Accordingly, CN did not have the flexibility to utilize the remaining hours of service of the DWP crew to continue moving the train southward over WCL's line. Instead, the train (and the crew) terminates at Pokegema Yard and awaits a WCL crew to continue moving the train southward. DWP's trackage rights over WCL's line between South Itasca (Superior) and Fond du Lac, Wisconsin allow CN to keep the train moving and avoid having to terminate the train at Pokegema Yard. The result is greater operating flexibility, improved utilization of crew resources and reduced train delays.

DMIR's trackage rights over WCL's line between South Itasca and Fond du Lac accomplish the same thing. Similarly, WCL's trackage rights over DMIR's South Itasca-Shelton Junction, Minnesota line and DWP's parallel Nopeming Junction-Ranier line allow CN to utilize a WCL crew with hours remaining to move a WCL train north of Duluth/Superior.

Another example of the improved operating flexibility that the trackage rights provide relates to the topography of the Duluth/Superior area. DWP's Pokegema Yard in Superior is located at the bottom of two hills, one uphill to the west and one uphill to the east. Should a train stall going up either hill due to mechanical problems or wet rails (which on the Hawthorn Hill can often result in blocked highway crossings), the trackage rights provide us with the operating flexibility to more quickly respond with additional locomotive power to get the train moving again and clear the crossings.

DMIR's trackage rights over the WCL line between South Itasca and Fond du Lac also allow CN to better utilize DMIR crews during seasonal changes in DMIR traffic flows, for

example on all rail ore movements during the winter months when Lake Superior is frozen and DMIR ore movements to the lake docks at Duluth are significantly less than those of the vessel season.

I note that the United Transportation Union in its petition to revoke the trackage rights exemptions asserts that the carriers involved seek to "run roughshod over the collective bargaining agreements in place under the Railway Labor Act." That is simply not true. The crews on trains operating via these trackage rights over the line of a sister railroad will continue to be covered by all of the terms of the collective bargaining agreements that apply when the train is on a line of their home road, except to the limited extent required to allow these overhead trackage rights. Thus, a DWP crew operating via trackage rights over WCL's line south of Superior will continue to be covered by DWP's collective bargaining agreements. Similarly, the crew of a northbound WCL train operating via trackage rights over DWP's or DMIR's line will continue to be covered by WCL's collective bargaining agreements. The crew of a DMIR train operating via trackage rights over WCL's line will continue to be covered by DMIR's collective bargaining agreements. It is not CN's intent here to modify, avoid or prefer any collective bargaining agreement, beyond the extent described herein. Our objective is simply to improve the efficiency of our operations in this area.

Nor will the trackage rights take away any local switching work from employees of the railroad that owns the line. As set forth in the trackage rights agreements and the amendments to trackage rights agreements and discussed in the trackage rights Notices of Exemption, each of the trackage rights grants is limited to the same specific operating purposes. In each case, the agreement or amendment limits the trackage rights carrier to overhead movements, reblocking of cars within the same train and setting out cars requiring servicing.

The trackage rights carrier expressly cannot use the trackage for the purpose of switching cars to industries, storage or servicing of cars or equipment or the making up or breaking up of trains.

Finally, we expect that the trackage rights will result in a relatively balanced amount of work for the crews of the railroads involved. Based on our analyses, we have no reason to believe that the use of DWP or DMIR crews on trains operating south of Superior would be materially greater than the use of WCL crews on trains operating north of Superior.

The proposed trackage rights will result in greater operating flexibility, better utilization of crew resources and reduced train delays. I urge the Board to allow the trackage rights exemptions to continue in effect.

VERIFICATION

State of Wisconsin)
) SS:
County of Portage)

Mark Hightower, being duly sworn, deposes and says that he is Superintendent for CN, that he has read the foregoing statement, knows the facts asserted therein, and the same are true as stated.

Mark Hightower

SUBSCRIBED AND SWORN to before me
this 27 day of October, 2008.

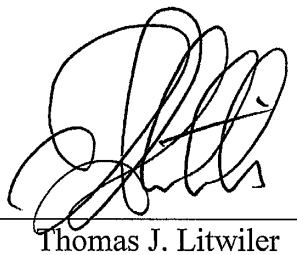
Notary Public

My Commission Expires: 11/13/2011

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2008, a copy of the foregoing **Reply to United Transportation Union's Petition to Revoke Exemptions** was served by overnight delivery upon:

Daniel R. Elliott, III
Associate General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107



Thomas J. Litwiler