

ORIGINAL

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Before the  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34881

UNION PACIFIC RAILROAD COMPANY  
--TRACKAGE RIGHTS EXEMPTION--  
BNSF RAILWAY COMPANY

ENTERED  
Office of Proceedings

JUN 05 2006

Part of  
Public Record

\_\_\_\_\_  
PETITION FOR STAY <sup>\*/</sup>

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

June 5, 2006

Attorney for John D. Fitzgerald

\*/ Expedited action is requested inasmuch as the exemption is published to become effective at 12:01 AM, Wednesday, June 7, 2006.

JUN 06 2006

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SURFACE TRANSPORTATION BOARD

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PETITION FOR STAY

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Preliminary Statement

John D. Fitzgerald,<sup>1/</sup> 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 May 31, 2006, by Union Pacific Railroad Company (UP), for UP to acquire trackage rights over the line of BNSF Railway Company (BNSF), between "Bullfrog Junction" and River Street Interlocking, a distance of approximately 0.6 miles, in Tacoma, WA.

The stay should extend until the separate agreement between UP and Tacoma Rail, granting Tacoma Rail the right to perform services on behalf of BNSF (and BNSF's agreement to have Tacoma Rail as BNSF's agent) over UP-owned trackage between Port of Tacoma and BNSF trackage (Tacoma Rail Trackage Rights) is made public (Notice, 9), and until any STB approval or exemption is

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

obtained, if necessary, and the terms of Exhibit B to the notice made known (Notice, 16), along with other filings in connection with a UP/BNSF restructuring of operations are made known,<sup>2/</sup> and until such time as UTU/GO-386's petition to revoke is decided by the Board.

### Background

The proposed UP trackage rights over approximately 0.6-mile of BNSF's line at Tacoma, are related to a separate UP agreement whereby Tacoma Rail is to perform service on behalf of BNSF over UP-owned trackage between Port of Tacoma and BNSF trackage at Tacoma on BNSF's Seattle subdivision. (Notice, 9). The stated intent of the instant UP/BNSF trackage rights agreement at Tacoma is to create an additional overhead routing for UP trains in the Tacoma, WA area (Notice, 4), for the sole purpose of overhead movement of freight trains to and from Port of Tacoma. (Notice, 9). Further, UTU/GO-386 has been advised by BNSF that a related trackage rights application will be filed on the Seattle subdivision with Longview Switching Company (LSC), with LSC also handling BNSF traffic for BNSF, and UP traffic for UP.

The terms of these separate agreements are unknown, as are the terms of Exhibit B to the instant UP/Trackage rights at Tacoma. (Notice, 16).

In addition, the instant UP/BNSF trackage rights agreement at Tacoma, with Tacoma Rail to handle BNSF cars over other UP track-

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<sup>2/</sup> Petitioner is aware of one related filing which has been made (F.D. No. 34880). Another is in the offing. UTU/GO-386 as been served with N&W Trackage Rights notice for this anticipated filing, involving Longview Switching Company. See verified statement of J.D. Fitzgerald, attached.

age in a separate agreement (Tacoma Rail Trackage Rights), is also related to Finance Docket No. 34880, Union Pacific Railroad Company-Trackage Rights Exemption-BNSF Railway Company (Portland/North Portland), filed May 26, 2006,<sup>3/</sup> according UP track-age rights over BNSF between Portland and North Portland Junction, OR, and including a separate agreement whereby Portland & Western Railroad, Inc. (PNWR) will serve as BNSF's agent between Labish (Salem) and Portland over UP's line. (Agency Rights).

It is clear that UP and BNSF are engaged in plans for a major restructuring of their railroad operations in the area between Seattle, WA, and Eugene, OR, with significant proposed transfers of railroad work between themselves and neighboring short-line and regional rail carriers.

The Board should stay the operation of the notice of exemption pending disclosure of the entire projected plan, the filing of appropriate petitions, applications, or notices, and disposition petition to revoke.

This petition for stay embraces anticipated arguments by UP, as expressed in its rely to UTU/GO-386, filed June 2, in Finance Docket No. 34880 (Portland/North Portland).

#### Timeliness

UP asserts UTU/GO-386 has purposely delayed in bringing certain objections regarding Seattle, WA-Eugene, OR matters to the Board's attention, claiming UTU/GO-386 was aware of UP's FD 34880

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<sup>3/</sup> UTU/GO-386 on June 1, petitioned for stay of operation of the UP notice of exemption. UP replied on June 2, 2006. The transaction has not been consummated. BNSF has advised consummation will not occur prior to July 1, 2006.

filing on May 26, but did not file its stay request until June 1, <sup>4/</sup> and did not serve UP until 4:51 PM EDT on that date. The fact is that neither UTU/GO-386 nor its counsel was unaware of UP's notice of exemption until after the Memorial Day weekend, on Tuesday, May 30, and was not received by UTU/GO-386 until the following May 31. On that day, UTU/GO-386 was advised by Washington counsel that a filing had been made in F.D. No. 34881, but was totally unaware of the nature or location of the transaction from its mere listing on the Board's website, and was unable to visit the Board's offices due to flooding early that afternoon. A request for stay to the STB was made June 1, at apx. 3:45PM EDT, with telephone and FAX delivery to UP at 3:51 PM EDT. UP's reply was served by facsimile June 2 at 5:14 EDT. UTU/GO-386 has acted in good faith and without delay in this matter, and is entitled to equitable remedies.

Moreover, neither F.D. No. 34880, nor F.D. No. 34881, have been consummated, and the 20-day employee notice period has not expired. The Board has unquestionable authority to act.

#### ARGUMENT

The STB should stay the operation of the notice of exemption, for the following reasons, among others:

- I. UTU/GO-386 HAS A HIGH PROBABILITY OF SUCCESS THAT THE NOTICE WILL BE REJECTED OR THE EXEMPTION REVOKED.

1. Outside Class Exemption. The use of the trackage rights class exemption for the 0.6-mile trackage rights at Tacoma, WA is

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<sup>4/</sup> See: F.D. No. 34880, UP Reply 6/2/06.

improper. The 0.6-mile segment is only part of the transaction embraced in the trackage rights agreement which, in addition, covers Tacoma Rail operation on behalf of BNSF's over UP's line to and from Port of Tacoma. (Tacoma Rail Trackage Rights).

UP may contend--similar to its claim in F.D. No. 34880--that it will not seek STB approval for Tacoma Rail's trackage rights on the theory such is an agency matter between Tacoma Rail and BNSF. It is not clear whether UP's argument would be on the ground a Tacoma Rail/BNSF agency agreement is not subject to STB approval/exemption, or whether UP will not be the party to seek approval/exemption. However, Tacoma Rail Trackage Rights is over the UP-owned track, such that UP is a party to the transaction, whatever it may say to the contrary.

To be sure, railroads commonly "swap" trackage rights, but the instant Tacoma and Tacoma Rail are not simply an exchange between UP and BNSF, but involve a third carrier, PNWR.

Moreover, the instant Tacoma trackage rights is not only related to Tacoma Rail Trackage Rights, but also is part of a restructuring of UP and BNSF operations, along with short-line and regional carriers, in the Seattle, WA-Eugene, OR area. The instant F.D. No. 34881 is clearly related to F.D. No. 34880, and also to the forthcoming Longview Switching Company transaction.

The trackage rights class exemption does not exist, standing alone, for complicated or involved multiple-carrier interrelated transactions. Of course, major coordination or consolidation projects frequently have a number of separate trackage rights, abandonment, etc. transactions, which are considered along with the major transaction. Here, on the other hand, UP wants to

proceed first with a class exemption, and then, presumably, await the related matters. The STB should not permit use of the trackage rights class exemption in the present circumstances, particularly when the facts surrounding all of the proposals have not been presented, and all of the proposals have not yet even been docketed.

2. Inadequate Record. The factual basis is incomplete for proceeding under the class exemption at this time for Tacoma. The necessary information is lacking for Tacoma Rail Trackage Rights, even assuming the Tacoma Rail trackage rights over UP's line would be a separate proceeding. The important facts governing the proposed Tacoma Rail trackage rights are important in determining whether to revoke the Tacoma trackage rights class exemption.

The key requirement in revoking a trackage rights class exemption is whether regulation is needed to carry out elements of the rail transportation policy (RTP). 49 U.S.C. 10101, 10502(d). Even assuming, arguendo, that the STB can consider separately Tacoma and Tacoma Rail Trackage Rights, the facts surrounding each proceeding are relevant to determining the revocation factors for each proceeding. The competitive situation at Port of Tacoma constitutes critical criteria under the RTP, e.g., §10101(1), (4), (5), (6), (12). The creation of an additional routing at Tacoma raises matters of operational necessity, efficiency, and energy use under the RTP, §10101(3), (4), (5), (9), (14).

A proceeding is required to determine the RTP issues posed by Tacoma and Tacoma Rail Trackage Rights, with revocation and ultimate resolution under 49 U.S.C. 11324(d). The proceeding must

be considered along with other proposals for the UP/BNSF restructuring in the Seattle, WA-Eugene, OR area.

3. Petition or Application. UTU/GO-386 has a high probability of success in rejecting the notice of exemption as improperly limited and inadequately supported as filed, or in revoking the exemption. UP should be required to file a petition for exemption or an application, under the present circumstances.

II. RAIL EMPLOYEES WILL LIKELY SUFFER  
IRREPARABLE INJURY WITHOUT A STAY.

Railroad employees have a strong interest in knowing the full scope of a transaction so they may evaluate whether certain employee conditions are satisfactory to protect their interests, and so that they may exercise various options. As matters presently stand, the paucity of information, particularly with respect to Tacoma Rail takeover of BNSF operations over UP's line to and from Port of Tacoma, indicates that BNSF train service personnel will suffer irreparable injury in loss of work to Tacoma Rail. Port of Tacoma is a major seaport, with large volumes of traffic in export and import commerce.

III. UP WILL NOT BE INJURED  
IF A STAY IS GRANTED.

UP will not suffer injury if a stay is granted at this time. As its notice indicates, UP presently has satisfactory routes in the Tacoma area. The purpose of the instant Tacoma trackage rights for UP over BNSF is merely to create an additional overhead routing for UP trains in the Tacoma, WA area. (Notice, 4).


IV. THE PUBLIC INTEREST REQUIRES A STAY.

The public interest will be best served by a stay at this time. All of the facts and ancillary agreements, with or without STB approval or exemption, should be made known. UP and BNSF should not proceed piecemeal, and should first make full disclosure of their restructuring plans for the Seattle, WA-Eugene, OR area.

CONCLUSION

The Board should stay the operation of the exemption ;ending further order of the Board.

Respectfully submitted,

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

June 5, 2006

Attorney for John D. Fitzgerald

Certificate of Service

I hereby certify I have served a copy of the foregoing by overnight express service, facsimile, and telephone notice, upon counsel for applicant, Robert T. Opal, UPRR, Omaha, NE.

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 (BNSF). I am the same person of same name that submitted a verified statement, dated June 1, 2006, in a related proceeding, Finance Docket No. 34880, involving Union Pacific Railroad Company (UP) trackage rights over BNSF's line between Portland and North Portland Jct. (Portland/North Portland), and UP's agreement to an agency agreement between Portland & Western Railroad, Inc. (PNWR) and BNSF, for PNWR to act as BNSF's agent over UP trackage between Portland and Labish (Salem), (Agency Rights). OR. I have reviewed UP's response, filed June 2, to UTU/GO-386's presentation and my verified statement in that proceeding.

I have read the notice of exemption for the instant Finance Docket No. 34881, filed May 31, 2006, involving UP trackage rights over BNSF's line between "Bullfrog Junction" and River Street interlocking, a distance of approximately 0.6 miles in Tacoma, WA (Tacoma), with the separate agreement between UP and Tacoma Rail for Tacoma Rail to operate and perform services on behalf of BNSF over UP owned trackage between Port of Tacoma and BNSF trackage (Tacoma Rail Trackage Rights).

Subsequent to my June 1, 2006 verified statement in Portland/North Portland-Agency Rights, I have acquired additional information, not complete, concerning the proposed coordination

plans, also not complete according to my advice. I do not have a relationship with UP management, such as I have acquired over the years with BNSF as a BNSF employee, and as a BNSF employee representative.

A stay of the operation of the instant exemption (F.D. No. 34881) is necessary to preserve the status quo to prevent irreparable injury to BNSF employees. It is my understanding, from UP's June 2 reply in Portland/North Portland-Agency Rights, that UP is of the view that the various agency agreements, such as Agency Rights in F.D. No. 34880, and Tacoma Rail Trackage Rights in the instant F.D. No. 34881, do not involve UP as a party and that they are separate transactions involving BNSF and third carriers. I express no expert opinion at this time on UP's legal views, and I am not a lawyer, although the Agency Rights and Tacoma Rail Trackage Rights both involve rail operations over UP-owned trackage, which seems to me as directly involving UP. However, in any event, BNSF train and engine service employees would suffer obvious injury by Tacoma Rail's operation of present BNSF's train service over UP's trackage to and from the Port of Tacoma. I cannot at this time determine the full extent of injury to BNSF employees, inasmuch as I have not seen the proposed Tacoma Rail/BNSF agreement, assuming such has been finalized.

I am concerned that if the STB allows UP to go forward with the instant Tacoma trackage rights, such would serve to prejudice and prejudice any STB decision involving Tacoma Rail Trackage Rights. UP would not be prejudiced by any delay, particularly as it indicates Tacoma, standing by itself, would simply be an additional overhead UP route in the Tacoma, WA area. (Notice, 4).

I have been advised by BNSF that a third trackage rights filing will be made for coordinations in the involved area. This is for Longview Switching Company (LSC) to have overhead trackage rights over BNSF's line between Longview Junction and Kelso, WA, to handle BNSF's traffic, among other arrangements.

Attached as my Appendix 1 are the three BNSF notices, each served under Article 1, §4 of the Norfolk & Western employee conditions, covering the proposed transactions in Portland/North Portland (F.D. No. 34880), Tacoma (F.D. No. 34881), and Longview Switching. The notices are each dated May 31, 2006, and received in my office on or about June 1, 2006. The Norfolk & Western conditions require at least 20 days notice prior to consummation.

I do not believe Norfolk & Western conditions to be adequate for aspects of this coordination plan. This has all of the appearance and requirement for New York Dock employee protective conditions.

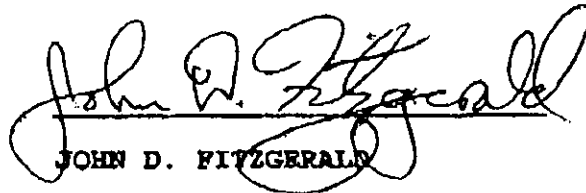
UP should not be permitted to treat its Tacoma trackage rights as a transaction separate and apart, from according Tacoma Rail trackage rights over UP's line to handle BNSF traffic in the same area and as part of a single master agreement.

VERIFICATION

STATE OF WASHINGTON )  
COUNTY OF CLARK )

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

Dated at  
Vancouver WA  
June 5, 2006

  
JOHN D. FITZGERALD

APPENDIX 1  
Page 1 of 3



Wendell Bell  
General Director  
Labor Relations

BNSF Railway Company  
P.O. Box 901000  
Ft. Worth, TX 76161-0000  
2600 Lou Menck Dr. OOB-GL  
Ft. Worth, TX 76131-2800  
phone: 817 582 1020  
fax: 817 362 7482  
mobile: 817 839 8429  
wendell.bell@bnsf.com

May 31, 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 a trackage rights operation in the Portland, Oregon area.

UP has been granted overhead trackage rights between Portland, Oregon, in the vicinity of BNSF's Main Track 1 Milepost 0.69 and BNSF's Main Track 2 Milepost 0.91 and North Portland Junction in the vicinity of BNSF's Milepost 8.1, all on BNSF's Fallbridge Subdivision, a distance of 7.41 miles on Main Track 1 and 7.19 miles on Main Track 2.

If further handling is needed, please contact me.

Sincerely,

MAY 31 2006

mttrport60591/6.5.31



Wendell Bell  
General Director  
Labor Relations

BNSF Railway Company  
P.O. Box 681636  
P.L. World, TX 76181-0036  
2800 Lou Mark Dr. 008-01,  
P.L. World, TX 76131-3800  
phone: 817 382 1020  
fax: 817 382 7452  
mobile: 817 899 8439  
wendell.bell@bnsf.com

May 31, 2006

**REGISTERED MAIL - RETURN RECEIPT REQUESTED**

Mr. Robert Kerley, GC  
UTU

Mr. Dennis Pierce, GC  
BLETD-IBT

Gentlemen:

This is a notice, under Section 4 of the Norfolk & Western Conditions, of a trackage rights operation in the Tacoma, Washington area.

UP has been granted overhead trackage rights between a point (Bullfrog Junction) located at the section line north of BNSF's Puyallup River Bridge B.78 in BNSF's Tacoma terminal to a control point in the River Street Interlocking (Tacoma) which joins the BNSF Mainline at Milepost 38.94X on BNSF's Seattle Subdivision. This is about .6 of a mile, and, for your aid in understanding this, I am attaching a map of the trackage involved.

If further handling is needed, please contact me.

Sincerely,



Wendell Bell  
General Director  
Labor Relations

BNSF Railway Company  
P.O. Box 961000  
Ft. Worth, TX 76101-0000  
2800 Low Mark Dr. Q08-GL  
Ft. Worth, TX 76131-2800  
phone: 817 262 1000  
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mobile: 817 828 8400  
wendell.bell@bnsf.com

May 31, 2006

**REGISTERED MAIL - RETURN RECEIPT REQUESTED**

Mr. Robert Kerley, GC  
UTU

Mr. Dennis Pierce, GC  
BLETD-IBT

Gentlemen:

This is a notice, under Section 4 of the Norfolk & Western Conditions, of a trackage rights operation in the Longview, Washington area.

Longview Switching Company has been granted overhead trackage rights from a point south of Longview Junction at MP 104.1 to north of Kelso at MP 96.0 on BNSF's Seattle Subdivision. This is for the purpose of overhead movement of cars of BNSF and UP being handled by LSC during switching operations at Longview Junction by LSC. In connection with this trackage rights operation, UP will handle BNSF's loaded and empty cars between Longview Junction and Napavine, Winlock, Rocky Point and Kelso, while BNSF will handle UP's loaded and empty cars between Longview Junction and Woodland and Kalama.

If further handling is needed, please contact me.

Sincerely,