

BEFORE THE  
SURFACE TRANSPORTATION BOARD

240186

ENTERED  
Office of Proceedings  
February 22, 2016  
Part of  
Public Record

---

DOCKET NO. FD 35992

WISCONSIN CENTRAL LTD.  
-- TRACKAGE RIGHTS EXEMPTION --  
LINES OF UNION PACIFIC RAILROAD COMPANY AND  
ILLINOIS CENTRAL RAILROAD COMPANY

---

**REPLY OF WISCONSIN CENTRAL LTD.  
TO HOUSEKEEPING STAY REQUEST OF  
UNION PACIFIC RAILROAD COMPANY**

Thomas J. Litwiler  
Robert A. Wimbish  
Fletcher & Sippel LLC  
29 North Wacker Drive  
Suite 920  
Chicago, Illinois 60606-2832  
(312) 252-1500

**ATTORNEYS FOR  
WISCONSIN CENTRAL LTD.**

Dated: February 22, 2016

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

DOCKET NO. FD 35992

WISCONSIN CENTRAL LTD.  
-- TRACKAGE RIGHTS EXEMPTION --  
LINES OF UNION PACIFIC RAILROAD COMPANY AND  
ILLINOIS CENTRAL RAILROAD COMPANY

---

**REPLY OF WISCONSIN CENTRAL LTD.  
TO HOUSEKEEPING STAY REQUEST OF  
UNION PACIFIC RAILROAD COMPANY**

Wisconsin Central Ltd. (“WCL”) hereby replies to the alternative requests of Union Pacific Railroad Company (“UP”) that the Board either – (a) postpone indefinitely the effective date of the above-docketed trackage rights class exemption notice pursuant to a “housekeeping stay” until such time as the parties address UP’s withholding of consent to WCL’s proposed trackage rights operations;<sup>1</sup> or (b) state that its issuance of the subject class exemption notice “does not constitute a ruling on the parties’ contractual rights.”<sup>2</sup> UP’s housekeeping stay request is unwarranted and should be denied. It is undisputed that WCL’s trackage rights exemption authority is permissive and that, in issuing the notice of exemption, the Board does not rule on the party’s respective contract rights, which the parties are free to pursue in an appropriate forum as necessary. WCL does not object to the Board’s recitation of that established proposition in the notice.

---

<sup>1</sup> See Union Pacific Railroad Company, Verified Response to Notice of Exemption and Request for Housekeeping Stay (“UP Stay Request”) at 4 (filed February 17, 2016).

<sup>2</sup> UP Stay Request at 4-5.

## BACKGROUND

Collectively, WCL's trackage rights class exemption notice filing (the "WCL Notice") and the UP Stay Request set forth the following facts and circumstances:

- The materials appended to the WCL Notice reflect that Illinois Central Railroad Company ("IC") possesses qualified easement and contract rights under which it may admit a third party carrier such as WCL onto the UP-owned rail line segments at issue here, subject to the admittee's acceptance of the trackage rights terms applicable to IC. The applicable agreements provide that UP must allow WCL's admission under IC's rights unless UP articulates a reasonable basis for withholding consent. IC has not yet received UP's consent to the proposed trackage rights arrangement, but WCL believes that UP's withholding of consent is not in keeping with UP's limited rights.
- UP has not asked for the Board to reject the WCL Notice, nor has UP stated categorically that it will refuse to allow WCL to be admitted onto the subject lines.<sup>3</sup> Rather, UP has "agreed to enter negotiations with IC for a trackage rights agreement that would allow for WCL to operate over [UP]'s tracks." UP Stay Request at 4.
- UP argues that the Board should indefinitely stay WCL's class exemption effective date until WCL negotiates a further written agreement with UP. UP's request for an injunctive remedy is premised exclusively upon the Board's so-called "housekeeping stay" authority. UP does not argue, much less demonstrate, that it would be entitled to injunctive relief under the Board's conventional, four-part stay criteria set forth in Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).
- WCL acknowledged that the trackage rights class exemption it had invoked is permissive, not mandatory; and that any asserted question concerning IC's rights to admit WCL as a trackage rights operator could be resolved in another forum.<sup>4</sup>

The unresolved issues among IC, WCL and UP involve the interpretation and enforcement of agreements that entitle – (a) IC under certain circumstances to admit a third party

---

<sup>3</sup> The present proceeding is thus factually distinguishable from Winamac Southern Railway Company – Trackage Rights Exemption – A. & R. Line, Inc., Docket No. FD 35208 (STB served Jan. 9, 2009), which UP has cited as a theoretical basis for rejecting the WCL Notice and requiring WCL to file an individual petition for exemption.

<sup>4</sup> WCL Notice at 6, n.8.

carrier to operate on the lines over which IC already possesses trackage rights pursuant to the same terms and conditions applicable to IC; and (b) UP under limited conditions to withhold consent to IC's proposal to admit WCL. Among other things, the parties disagree upon whether UP may insist upon a separate, stand-alone WCL-UP trackage rights agreement, or whether (in light of the agreements filed with the WCL Notice that would govern WCL's trackage rights operations) all that is needed to effectuate WCL's rights is UP's long overdue expression of consent or, alternatively, a finding that UP's withholding of consent is legally invalid.<sup>5</sup>

### ARGUMENT

***A. UP's housekeeping stay pending resolution of contract "issues" is unnecessary, contrary to precedent, and should be denied***

Postponement of the trackage rights exemption's effective date – whether under housekeeping stay or otherwise – is unwarranted and unnecessary. If UP legitimately were to withhold its consent to WCL's admission in accordance with the specific terms of the underlying IC-UP agreements, then WCL may not exercise the proposed trackage rights operations. As such, the injunction UP seeks would serve no purpose. A stay would neither protect nor advance any clear agency policy, and it should be denied.

UP claims that an indefinite housekeeping stay is appropriate here because it would allow the parties additional time to address "issues" that "cannot be immediately resolved."<sup>6</sup> The "issues" here, of course, lie in contract, and, as it has stated many times, "the Board does not undertake to interpret or enforce operating agreements or contracts."<sup>7</sup> Such

---

<sup>5</sup> Accordingly, if the Board were to issue a stay here on the premise that UP and WCL first must enter into a written agreement in addition to the agreements already submitted as part of WCL's exemption filing, such a ruling would, in itself, interpret in significant part the respective contract rights of the parties in favor of UP.

<sup>6</sup> UP Stay Request at 3.

<sup>7</sup> See, e.g., City of Peoria and the Village of Peoria Heights, IL – Adverse Discontinuance –

issues can be and must be resolved in another forum. More importantly, UP has not proven that the Board has used or should use its injunctive authority as a means to force parties to “resolve [external] issues,” as UP would have it do here.

None of the three cases cited by UP supports the proposition that the Board should stay this proceeding pending the resolution of the underlying contract issues. In fact, two of the cases support the opposite conclusion – that the Board does not and should not call a “procedural time out” to await the resolution of underlying contractual matters.<sup>8</sup>

The Jackson County<sup>9</sup> proceeding involved issues extending beyond a mere contract dispute. There, an interested party (CenturyLink) questioned whether Jackson County properly had invoked the Board’s procedures to become a rail common carrier despite statements suggesting that the county might not fulfill its assumed common carrier obligations – an issue well within the scope of the Board’s oversight, and an appropriate matter for the agency to address up front. CenturyLink also pointed to certain contract concerns regarding easement rights it held in support of its stay request. The Board briefly stayed the proceeding “to provide sufficient time for the Board to address the arguments presented.”<sup>10</sup> The Board shortly thereafter lifted the stay notwithstanding the continued presence of CenturyLink’s unresolved contractual concerns, stating that “CenturyLink has not supported its claim that the issues involving the Easement Agreement . . . are . . . within the Board’s jurisdiction . . . Further, any rights that

---

Pioneer Industrial Railway Company, Docket No. AB-878 (STB served Aug. 10, 2005), slip op. at 6 (and cases cited therein).

<sup>8</sup> In the third case, the Board imposed a “brief” housekeeping stay to address stated concerns that the transaction proposed therein threatened rate and service harm to a shipper. There were no contractual disputes. See BNSF Railway Company, et al. – Joint Relocation Project Exemption – In Council Bluffs, Iowa, Docket No. FD 35755 (STB served Nov. 8, 2013).

<sup>9</sup> Jackson County, Mo. – Acquisition and Operation Exemption – Union Pacific Railroad Company, Docket No. FD 35892 (STB served Jan. 21, 2016) (“Jackson County”).

<sup>10</sup> Jackson County, slip op at 2.

CenturyLink seeks to enforce under the Easement Agreement or the related court order can be brought before the state court.”<sup>11</sup>

The BNSF-Trackage Rights<sup>12</sup> proceeding parallels Jackson County. In BNSF-Trackage Rights, the Board found it necessary to address a dispute bearing upon closely intertwined abandonment and trackage rights proceedings, which required, among other things, for the Board to sort out whether or not BNSF possessed STB-granted authority over the line UP had targeted for abandonment, a matter clearly within the agency’s oversight. The housekeeping stay in BNSF-Trackage Rights was granted in the context of UP’s (later denied) petition to reject the BNSF trackage rights notice filing, a remedy that UP expressly is not pursuing here. And in keeping with Jackson County, the Board imposed a housekeeping stay to consider “issues raised in both proceedings,”<sup>13</sup> not to “allow” the parties to resolve their contractual differences first. Tellingly, the Board in BNSF-Trackage Rights ultimately lifted the stay, permitting the contested exemption to take effect despite the continued presence of a contract dispute. Its language was clear and compelling:

[T]he authorization granted through an exemption is permissive: it gives the parties permission to proceed with a transaction or activity, using whatever underlying contractual rights they may have, but it is not dispositive as to whether or not a party actually has a specific contractual right. Although BNSF makes a plausible argument that the First Supplemental Agreement provides it with the trackage rights it claims, we will leave this interpretation to an arbitrator in the first instance . . .<sup>14</sup>

---

<sup>11</sup> Jackson County, FD 35982 (STB served Feb. 4, 2016), slip op. at 2 (citations omitted).

<sup>12</sup> BNSF Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company, Docket No. FD 35601 (STB served Mar. 21, 2012) (“BNSF-Trackage Rights”).

<sup>13</sup> BNSF-Trackage Rights, slip op. at 2.

<sup>14</sup> BNSF-Trackage Rights, FD 35601 (STB served Jun. 19, 2013), slip op. at 7 (footnote omitted) (citing Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, Docket No. FD 35631 (STB served Oct. 11, 2012), slip op. at 4; BNSF Ry.—Discontinuance of Trackage Rights Exemption—in Peoria & Tazewell Cntys., Ill., Docket No. AB 6 (Sub-No.

On reconsideration, the Board was similarly unequivocal:

[The agency] has made clear repeatedly . . . [that] the authorization of [trackage rights] through an exemption is permissive, and the Board does not typically resolve disputes over the meaning of the underlying contracts. To the extent [that any interested party] has concerns arising under contract law, it may seek to obtain relief in another forum.<sup>15</sup>

UP's concerns here involve contract and easement rights of the type that the Board consistently has declined to interpret or to adjudicate. They are matters subject to interpretation and enforcement in another forum as necessary. WCL is aware of no precedent wherein the Board invoked its housekeeping stay authority to enjoin the effectiveness of a class exemption pending the resolution of underlying contract issues.<sup>16</sup> UP's housekeeping stay request is unsupported and unwarranted, and must be denied.

***B. WCL does not object to UP's alternative request for a Board declaration in lieu of a housekeeping stay***

UP has asked that, if the Board does not indefinitely postpone the effective date of WCL's class exemption notice, the Board should declare that it is not ruling, and has not ruled, on the parties' respective contract rights. As WCL's arguments herein make clear, that is indisputably a governing principle of the Board's jurisprudence. Although it would appear

---

470X) et al. (STB served Apr. 26, 2011), slip op. at 11-12; Sioux Valley Reg'l R.R. Auth.—Trackage Rights Exemption—Lines of South Dakota, Docket No. FD 34646 (STB served Jan. 19, 2005), slip op. at 4; Buckingham Branch R.R.—Lease—CSX Transp., Inc., Docket No. FD 34495 (STB served Nov. 5, 2004), slip op. at 11).

<sup>15</sup> BNSF-Trackage Rights, FD 35601 (STB served Sept. 11, 2013), slip op. at 5-6 (footnotes and citations omitted). WCL recited and endorsed these principles in its notice of exemption. WCL Notice at 6, n.8.

<sup>16</sup> Indeed, WCL does not believe that a “housekeeping” stay can or should ever be dependent upon the resolution of external factors or disputes beyond the agency's control, as UP invites here.

unnecessary, WCL does not object to the Board saying so again in a decision denying UP's housekeeping stay request.

WHEREFORE, WCL respectfully requests that UP's petition for a housekeeping stay be denied.

Respectfully submitted,

By: R. A. Wimbish

Thomas J. Litwiler  
Robert A. Wimbish  
Fletcher & Sippel LLC  
29 North Wacker Drive  
Suite 920  
Chicago, Illinois 60606-2832  
(312) 252-1500

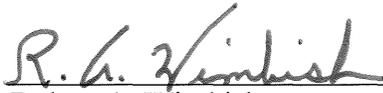
**ATTORNEYS FOR  
WISCONSIN CENTRAL LTD.**

Dated: February 22, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that I have today served the following party of record with a copy of the foregoing Reply of Wisconsin Central Ltd. to Housekeeping Stay Request of Union Pacific Railroad Company by electronic delivery and U.S. Postal Service delivery, first class postage prepaid:

Jeremy M. Berman  
Union Pacific Railroad Company  
1400 Douglas Street, Stop 1580  
Omaha, NE 68179



---

Robert A. Wimbish  
Attorney for Wisconsin Central Ltd.

Dated: February 22, 2016