

**UNION PACIFIC RAILROAD**  
1400 Douglas Street, Stop 1580  
Omaha, Nebraska 68179

P 402 544 4735  
jmberman@up.com

**Jeremy M. Berman**

General Attorney

February 16, 2016

240130

**Via UPS Overnight**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 20024

ENTERED  
Office of Proceedings  
February 17, 2016  
Part of  
Public Record

**Re: Docket No. FD 35992  
Wisconsin Central Ltd.– Trackage Rights Exemption – Lines of Union  
Pacific Railroad Company and Illinois Central Railroad Company**

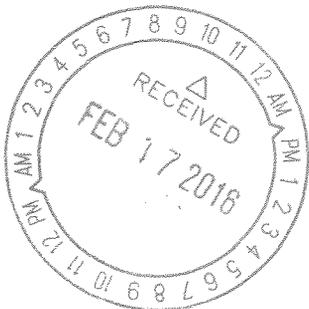
Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of a Union Pacific's Verified Response to Notice of Exemption and Request for Housekeeping Stay.

Please feel free to contact me if you have any questions.

Respectfully submitted,

  
Jeremy M. Berman



cc: Robert A. Wimbish



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35992

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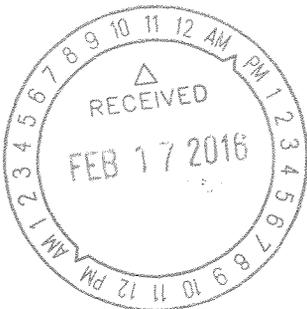
WISCONSIN CENTRAL LTD.  
– TRACKAGE RIGHTS EXEMPTION –  
LINES OF UNION PACIFIC RAILROAD COMPANY AND  
ILLINOIS CENTRAL RAILROAD COMPANY

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**VERIFIED RESPONSE TO NOTICE OF EXEMPTION AND  
REQUEST FOR HOUSEKEEPING STAY**

LOUISE A. RINN  
CRAIG V. RICHARDSON  
JEREMY M. BERMAN  
Union Pacific Railroad Company  
1400 Dodge Street, Stop 1580  
Omaha, NE 68179  
Phone: (402) 544-1658

*Attorneys for Union Pacific Railroad Company*



February 16, 2016

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35992

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WISCONSIN CENTRAL LTD.  
– TRACKAGE RIGHTS EXEMPTION –  
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ILLINOIS CENTRAL RAILROAD COMPANY

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**VERIFIED RESPONSE TO NOTICE OF EXEMPTION AND  
REQUEST FOR HOUSEKEEPING STAY**

Union Pacific Railroad Company (“Union Pacific”) submits this verified response to the verified notice of exemption (“Notice”) filed by Wisconsin Central Ltd. (“WCL”) in this proceeding on January 28, 2016 and requests that the Board issue a housekeeping stay to postpone the effective date of exemption sought in the Notice with respect to WCL’s authorization to operate over Union Pacific’s track.<sup>1</sup> Union Pacific has an interest in this proceeding because WCL is seeking authority from the Board to operate via trackage rights over a line of railroad owned by Union Pacific. The Board should issue a housekeeping stay postponing the effective date of WCL’s operations over Union Pacific’s track because WCL does not currently have Union Pacific’s consent to operate and therefore the Notice was filed prematurely. A housekeeping stay will provide the parties with time to negotiate for the operating rights sought by WCL. A stay will not harm WCL because, as WCL appears to acknowledge, WCL must obtain UP’s consent before operating over UP’s track. Notice at 5-6.

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<sup>1</sup> In its Notice, WCL also requests authorization to operate over track owned by Illinois Central Railroad Company (“IC”). Union Pacific does not object to the Board authorizing such operation.

## BACKGROUND

There is no existing trackage rights agreement between WCL and Union Pacific that allows WCL to operate over the Union Pacific track in question. As a result of a transaction involving IC and a UP predecessor, the Chicago, Missouri & Western Railway Company (“CMW”), there is a trackage rights agreement that allows IC to operate over the Union Pacific track in question (the “Reservation of Trackage Rights Agreement”). Notice at 3-4. WCL’s Notice is premised on WCL being allowed to piggyback on IC’s rights to operate over Union Pacific’s track as an admittee of IC under the Reservation of Trackage Rights Agreement. *Id* at 4. However, under the Reservation of Trackage Rights Agreement, IC is allowed to admit other railroads to operate over Union Pacific’s tracks only after receiving prior written consent from Union Pacific.<sup>2</sup> While Union Pacific has expressed a willingness to discuss the terms of WCL’s admittance, Union Pacific has not provided consent for WCL’s operations.

In the CMW transaction, IC also retained an easement to operate over the Union Pacific track in question. Notice at 4. This easement does not grant WCL the right to operate over Union Pacific’s track because, like the Reservation of Trackage Rights Agreement, the easement requires Union Pacific’s consent before IC may grant another railroad rights to operate over Union Pacific’s track.<sup>3</sup> Moreover, IC apparently concedes that the easement alone is insufficient to allow IC to operate over Union Pacific’s tracks. Notice at 3 (“To effectuate IC’s easement rights, UP’s predecessor and IC entered into a ‘Reservation of Trackage Rights Agreement’ ...”).

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<sup>2</sup> Reservation of Trackage Rights Agreement, attached as Exhibit D to the Notice, at 3.

<sup>3</sup> Indenture/Deed, attached as Exhibit A to the Notice, at 2.

WCL cannot plausibly claim that it currently has the contractual right to operate over Union Pacific's track. Therefore, a housekeeping stay is appropriate as it will not harm WCL and will allow the parties to negotiate for the operating rights sought by WCL.<sup>4</sup>

### ARGUMENT

#### *A Housekeeping Stay is Warranted in Light of Board Precedent and the Circumstances of this Proceeding*

The Board routinely grants housekeeping stays when a stay is necessary to allow parties or the Board additional time to address issues presented by a notice of exemption which cannot be immediately resolved.<sup>5</sup> Additional time is required in this proceeding because WCL does not currently have the contractual right to operate over Union Pacific's track.

WCL seeks an exemption for trackage rights to operate over Union Pacific's tracks under 49 C.F.R. § 1180.2(d)(7). This section provides for a class exemption for the acquisition of trackage rights that are: (i) based on written agreements, and (ii) not filed or sought in responsive applications in rail consolidation proceedings. WCL claims that this exemption applies because: (1) WCL has a written agreement with IC granting WCL trackage rights over IC; and (2) IC has a written agreement with Union Pacific granting IC trackage rights over Union Pacific. Notice at 4. There is no written agreement between WCL and Union Pacific, and WCL does not allege such an agreement exists. WCL acknowledges that under the agreements between IC and Union Pacific, WCL may not operate over Union Pacific's track without Union Pacific's consent.

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<sup>4</sup> As WCL recognizes, if IC or WCL believes Union Pacific is not living up to its contractual obligations then either or both may seek relief in a different forum. Notice at n. 8.

<sup>5</sup> See, e.g., *Jackson Cnty, Mo.—Acquisition and Operation Exemption—Union Pac. R. R.*, FD 35982 (STB served Jan. 21, 2016); *BNSF Ry., CBEC Ry., Iowa Interstate R. R. And Union Pac. R. R.—Joint Relocation Project Exemption—In Council Bluffs, Iowa*, FD 35751 (STB served Nov. 8, 2013); *BNSF Ry.—Trackage Rights Exemption—Union Pac. R. R.*, FD 35601 (STB served March 21, 2012).

Notice at 5. Because Union Pacific has not given such consent, there is no written agreement providing for WCL's claimed trackage rights over Union Pacific.

In some circumstances, the lack of a written agreement may be grounds for the Board to reject WCL's Notice.<sup>6</sup> However, in this case Union Pacific has agreed to enter negotiations with IC for a trackage rights agreement that would allow for WCL to operate over Union Pacific's tracks.<sup>7</sup> A housekeeping stay is the appropriate remedy here because it will provide the parties with time to negotiate for the trackage rights sought by WCL without creating a burden on the parties or requiring unnecessary Board action. If and when such an agreement is reached, the stay may be lifted, and the Notice may become effective, without the need for WCL to file a new notice of exemption. A housekeeping stay will thus conserve the Board's and the parties' time and resources by not requiring duplication of efforts already undertaken.

The Board should impose a housekeeping stay and postpone the effective date of WCL's Notice, with respect to operations over Union Pacific track, until the parties are able to reach an agreement concerning WCL's operations.

***If a Housekeeping Stay is Not Granted, the Board Should Make Clear That WCL's Notice Does Not Give WCL the Right to Operate Over Union Pacific's Track***

As WCL recognizes, the Board's exemption authority is permissive and has no bearing on IC's rights under the agreements with Union Pacific. Notice at n. 8. Therefore, if the Board determines that a housekeeping stay is not warranted, Union Pacific requests that the Board issue

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<sup>6</sup> See *Winamac S. Ry.—Trackage Rights Exemption—A. & R. Line, Inc.*, FD 35208 (STB served Jan. 9, 2009) (rejecting a trackage rights notice of exemption because the landlord carrier was actively opposed to the transaction and asserted the trackage rights agreement was no longer in effect).

<sup>7</sup> As indicated in the Notice (at n. 5), Union Pacific served notice of termination of the Reservation of Trackage Rights Agreement, effective November 24, 2016, and offered to negotiate a replacement trackage rights agreement. Union Pacific expects the replacement agreement to be in place by or shortly after termination of the current agreement.

a decision indicating that issuance of a notice of exemption in this proceeding does not constitute a ruling on the parties' contractual rights. Such a decision is in accordance with the Board's well-established precedent concerning notices of exemption.<sup>8</sup>

### CONCLUSION

For the foregoing reasons, the Board should impose a housekeeping stay to postpone the effective date of WCL's Verified Notice of Exemption with respect to WCL's operating authority over Union Pacific's tracks. If, however, the Board determines a housekeeping stay is not appropriate, the Board should issue a decision affirming that the authorization granted by the Board pursuant to the Notice has no bearing on WCL's contractual rights to operate over Union Pacific's tracks.

Respectfully submitted,



LOUISE A. RINN  
CRAIG V. RICHARDSON  
JEREMY M. BERMAN  
Union Pacific Railroad Company  
1400 Dodge Street, Stop 1580  
Omaha, NE 68179  
Phone: (402) 544-1658

*Attorneys for Union Pacific Railroad Company*

February 16, 2016

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<sup>8</sup> See, e.g., *BNSF Ry.—Trackage Rights Exemption—Union Pac. R. R.*, FD 35601 (STB Served June 19, 2013); *Sioux Valley Reg. R.R. Auth.—Trackage Rights Exemption—Lines of the State of South Dakota*, FD 34646 (STB served Jan. 19, 2005)

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of February, 2016, I caused a copy of the foregoing reply to be served by e-mail and first-class mail, postage prepaid on the parties listed below.

Robert A. Wimbish  
Fletcher & Sippel LLC  
29 North Wacker Drive, Suite 920  
Chicago, Illinois 60606

  
Jeremy M. Berman

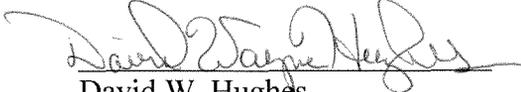
**VERIFICATION**

**OF**

**David W. Hughes**

I, David W. Hughes, General Manager Joint Facilities and Contracts for Union Pacific Railroad Company, declare under penalty of perjury that I have read the foregoing Petition to Reject Notice of Exemption and Request for Stay of Effective Date of Exemption and that the facts stated therein are true and correct to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this Verification.

Executed on February 16, 2016

  
David W. Hughes