

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832

Phone (312) 252-1500
Fax (312) 252-2400
www.fletcher-sippel.com

THOMAS J. LITWILER
(312) 252-1508
tlitwiler@fletcher-sippel.com

December 8, 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 Motion for Leave to File a Reply to a Reply and to United

FLETCHER & SIPPEL LLC

Ms. Anne K. Quinlan
December 8, 2008
Page 2

Transportation Union's Response to Carriers' Reply to Petition to Revoke, dated December 8, 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
MOTION FOR LEAVE TO FILE A REPLY TO A REPLY AND
TO UNITED TRANSPORTATION UNION'S RESPONSE TO
CARRIERS' REPLY TO PETITION TO REVOKE**

Thomas J. Healey
Counsel - Regulatory
CN
17641 South Ashland Avenue
Homewood, Illinois 60430
(708) 332-4381

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

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

Dated: December 8, 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

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
MOTION FOR LEAVE TO FILE A REPLY TO A REPLY AND
TO UNITED TRANSPORTATION UNION'S RESPONSE TO
CARRIERS' REPLY TO PETITION TO REVOKE**

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 surreply, and the motion for leave to file that surreply, filed on November 18, 2008 by the United Transportation Union ("UTU") in these six related trackage rights class exemption dockets. While CN does not object to the Board's acceptance of UTU's surreply, that pleading has no relevance to the legal issues presented by CN's notices of exemption and by UTU's petition to revoke those exemptions.

In reality, UTU seeks to convert these proceedings into a forum to debate the New York Dock Section 4 notice that has been served by CN and negotiated by the parties in other, different Board dockets. That notice would, among other things, provide for a single collective bargaining agreement covering all employees of DMIR, DWP and WCL. UTU objects to such an arrangement, and is free to pursue those objections in negotiations with CN. Such issues are, in turn, subject to arbitration under New York Dock, and would properly come to the Board (if at all) on review of that arbitration once completed. As CN has explained repeatedly and explicitly, however, the proposed intra-corporate trackage rights which are the subject of these proceedings have neither the intent nor the effect of avoiding any existing DMIR, DWP or WCL collective bargaining agreement. Employees of each of those railroads would continue to be subject to their own CBAs at all times while conducting the proposed trackage rights operations. It is UTU, not CN, which seeks to confuse the issues here.

It is little surprise that UTU's surreply seldom addresses the pending proposed trackage rights, and does not even attempt to address the controlling case law on the subject of intra-corporate trackage rights. See CN Reply at 4-7; Missouri Pacific Railroad Company -- Trackage Rights Exemption -- Union Pacific Railroad Company, Finance Docket No. 32656

(STB served May 17, 1996) ("MP/UP Trackage Rights"); 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"). Instead, UTU provides a lengthy, inflammatory recitation of the parties' negotiations pursuant to the New York Dock Section 4 notice served in September, 2007 in Finance Docket No. 34424, Canadian National Railway Company and Grand Trunk Corporation -- Control -- Duluth, Missabe and Iron Range Railway Company, et al. ("CN/GLT") and Finance Docket No. 34000, Canadian National Railway Company, et al. -- Control -- Wisconsin Central Transportation Corporation ("CN/WC"). CN has no intention of responding here to UTU's characterizations (and mischaracterizations) of such negotiations.¹ Those negotiations, involving a single DMIR/DWP/WCL collective bargaining agreement under the authority granted in CN/GLT and CN/WC, have nothing to do with proposed intra-corporate trackage rights that, by CN's own explicit admission, will leave the existing DMIR, DWP and WCL collective bargaining agreements wholly intact.²

It is thus nonsensical for UTU to claim that "CN was simply seeking these trackage rights in order to bring these three carriers under one collective bargaining agreement," UTU Surreply at 1, or that "[t]hese trackage rights exemptions are an integral part of [a] ruse to obtain one agreement on these properties." UTU Surreply at 14. The proposed trackage rights

¹ CN does note for the sake of accuracy that Exhibit B to the verified statement of UTU's John Babler is not, as UTU claims, a proposed implementing agreement offered by CN to UTU on September 18, 2008. Babler V.S., ¶9. It instead constitutes the proposal that UTU submitted to CN on that date. While consuming 162 pages of UTU's surreply, the proposal has no relevance to the issues presented by CN's proposed trackage rights in these proceedings.

² The existing CBAs would be modified only to the extremely limited extent necessary to actually allow the trains of one affiliate to enter onto the other affiliates' tracks. CN Reply at 4; Hightower V.S. at 3.

will not have such an effect. The debate over a single collective bargaining agreement is for another time and another proceeding.

UTU anticipates this fatal flaw in its argument. UTU Surreply at 12. Its hedge, however, is to return once again to its perception of the merits of the New York Dock Section 4 notice in CN/GLT and CN/WC. UTU Surreply at 13 ("In other words, the exact type of 'cramdown' that CN is engaging in now through its Section 4 notice was more or less prohibited by the Board when approving [the prior control transactions]."). UTU wants to treat this case as if it were the arbitration hearing on the Section 4 notice under CN/GLT and CN/WC. But it is not. It is instead a class exemption proceeding on intra-corporate trackage rights that will cause virtually no modification of -- and certainly no combination of -- existing collective bargaining agreements.

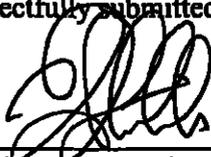
UTU seems particularly offended that CN did not discuss the pending New York Dock Section 4 negotiations in its reply to UTU's petition to revoke the trackage rights exemptions. Just what UTU thought CN was trying to hide is unclear. Obviously UTU was well aware of the Section 4 notice and the ongoing negotiations, and -- as its irrelevant surreply unfortunately demonstrates -- was easily capable of presenting them to the Board if they were material. But they are not material, and serve simply to clutter up a case that does not involve meaningful modification of existing collective bargaining agreements.

The relevant legal issue in these proceedings is whether corporate affiliates can grant each other trackage rights where the purpose of the transaction is increased operational efficiency and neither the intent nor the effect of the transaction is to abrogate or avoid existing collective bargaining agreements. The STB has plainly answered "yes" MP/UP Trackage Rights and NS/N&W Trackage Rights, supra. UTU doesn't answer the question at all, instead

preferring to turn this into a different case about different matters. That other case has its own arbitral and Board review procedures under New York Dock, and should not be preempted by a wrongful broadening of the limited issues here.

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

Respectfully submitted,

By: 

Thomas J. Healey
Counsel - Regulatory
CN
17641 South Ashland Avenue
Homewood, Illinois 60430
(708) 332-4381

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

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

Dated: December 8, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2008, a copy of the foregoing **Reply to United Transportation Union's Motion for Leave to File a Reply and to United Transportation Union's Response to Carriers' Reply to Petition to Revoke** 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