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July 11, 2006



Honorable Vernon A. Williams  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423-0001

**Re: Surface Transportation Board Finance Docket No. 34883, Portland and Western Railroad, Inc.—Trackage Rights Exemption—Union Pacific Railroad Company**

Dear Secretary Williams,

Enclosed for filing in the above referenced docket are an original and ten copies of a Reply to Petition for Stay.

Please acknowledge receipt of this material by date stamping the enclosed copy of this letter and returning it to me in the enclosed self-addressed stamped envelope.

Sincerely,

A handwritten signature in cursive script that reads "Sidney L. Strickland, Jr." Below the signature is the printed name "Sidney L. Strickland, Jr." in a standard serif font.

SLS/eew  
Encs.

cc: John Sims  
Karl Morell  
Allison M. Fergus

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Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD



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STB Finance Docket No. 34883

PORTLAND AND WESTERN RAILROAD, INC.—TRACKAGE RIGHTS  
EXEMPTION—  
UNION PACIFIC RAILROAD COMPANY

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**REPLY TO PETITION FOR STAY**

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ATTORNEYS FOR PORTLAND AND  
WESTERN RAILROAD, INC

Dated: July 11, 2006

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**REPLY TO PETITION FOR STAY**

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Portland and Western Railroad, Inc. (“PNWR”) hereby replies in opposition to the Petition For Stay (“Petition”) filed by John D. Fitzgerald, for and on behalf of United Transportation Union-General Committee of Adjustment (“UTU/GO-386”) on July 10, 2006.

**BACKGROUND**

On June 29, 2006, PNWR filed its Notice of Exemption, pursuant to 49 C.F.R. § 1180.2(d)(7), to permit PNWR to acquire overhead trackage rights over a 49.4 mile rail line owned by the Union Pacific Railroad Company (“UP”) located between East Portland, Oregon, in the vicinity of Milepost 770.3 and Labish, Oregon, in the vicinity of Milepost 720.9. The exemption became effective on July 6, 2006. In the Notice of Exemption, PNWR explained that it will be utilizing the overhead trackage rights for the purpose of providing PNWR the right to serve as BNSF’s agent over the joint trackage,

including the right to access the joint trackage via (1) Portland Terminal Railroad Company (“PTR”) trackage between PTR milepost 0.00 and BNSF mileposts 0.69 and 0.91; and (2) UP’s Willamette River Bridge.

### **REPLY**

Irrespective of the criteria for granting a stay, the Petition here should be rejected because it is untimely. The Petition is untimely because the Notice of Exemption became effective on July 6, 2006, and should, therefore, be rejected.

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (“*Petroleum Jobbers*”). It is the movant’s obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985), and the movant carries the burden of persuasion on each of the four elements required for the extraordinary relief. *Canal Authority of Fla. V. Callaway*, 489 F.2d 567, 573 (5<sup>th</sup> Cir. 1974). As is demonstrated below, UTU/GO-386 has failed to meet its burden under each of the four criteria.

#### **UTU/GO-386 Is Not Likely To Prevail On The Merits**

UTU/GO-386’s arguments lack merit. First, PNWR is a common carrier and therefore may invoke the trackage rights class exemption. Second, PNWR can obtain

STB authorization to carry out the proposed transaction, as BNSF's agent. Third, there is no pooling arrangement involved. Finally, under the present class exemption transaction, the present tenant, BNSF, will be substituted by PNWR as a new tenant over the involved UP and PTR lines. Therefore, STB trackage rights authorization is required.

In sum, UTU/GO-386 has failed to meet its burden of demonstrating that the stay criteria are satisfied. The transaction at issue does require Board authorization and, as noted by the Board in similar proceedings subject to its jurisdiction, is a matter that can be further pursued, if UTU/GO-386 wishes to do so, in a petition to reject or revoke the notice of exemption. See e.g., slip opinion in STB Finance Docket No. 34882, LONGVIEW SWITCHING COMPANY -- TRACKAGE RIGHTS EXEMPTION -- BNSF RAILWAY COMPANY served June 30, 2006.

**Denial Of The Stay Will Not Cause UTU/GO-386 Irreparable Harm**

An administrative decision is not ordinarily stayed without an appropriate showing of irreparable harm. *Permian Basin Area Rate Case*, 390 U.S. 747, 777 (1968). UTU/GO-386 has failed to demonstrate that any employee will suffer irreparable harm in the absence of a stay.

UTU/GO-386 alleges that BNSF employees will lose their jobs as a result of this proposed transaction. UTU/GO-386, however, fails to identify a single individual that will be adversely affected by the transaction. UTU/GO-386 merely suggests that two crews (not more than six (6) employees) may be impacted. In any event, the allegation, even if accurate, does not rise to the level of sustaining a finding of irreparable harm. The showing of "mere injuries, however substantial, in terms of money...expended in the absence of a stay" do not constitute irreparable injury because adequate compensatory

relief can be had at a later date. *Petroleum Jobbers*, at 925. Neither the Board nor the courts have found economic injuries of this nature to be irreparable because they are compensable through reparations. See Finance Docket No. 30965 (Sub-No. 1), *Delaware and Hudson Railway Co. – Lease and Trackage Rights Exemption – Springfield Terminal Railway Company* (not printed), served July 15, 1988. Indeed, the claimed loss of 72 employees was deemed inadequate by the Board to support a showing of irreparable harm. See STB Finance Docket No. 33326, *I&M Rail Link, LLC – Acquisition and Operation Exemption – Certain Lines of Soo Line Railroad Company D/B/A Canadian Pacific Railway* (not printed), served April 4, 1997. Here, UTU/GO-386 suggests not more than six (6) employees may be impacted. Moreover, none of these six (6) employees are expected to be adversely affected because “there are immediate needs for the incumbents to protect other assignments in the Portland – Vancouver terminal.” See Petition, Appendix 1 at 2.

#### **A Stay Would Harm Shippers And PNWR**

PNWR will improve operations in the area of the transaction. The improved operations will ultimately benefit the shipping public. Thus, delaying the implementation of the involved transaction will have a material, adverse effect on the shipping public by delaying the benefits they will realize once PNWR commences operations, as BNSF’s agent, in the area of the transaction.

#### **A Stay Is Not In The Public Interest**

UTU/GO-386 has failed to demonstrate how issuance of a stay would further the public interest. On the other hand, the proposed transaction is intended to increase the

efficiency of rail operations in the area and improve service to the shipping public.

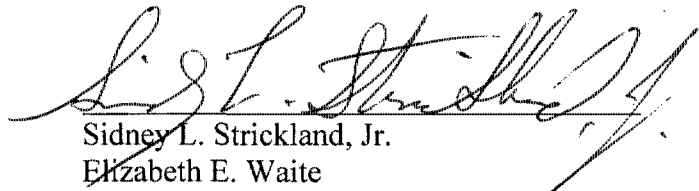
Consequently, granting the stay is contrary to the public interest.

### CONCLUSION

PNWR respectfully urges the Board to reject or deny UTU/GO-386's Petition.

The Petition is untimely and should be rejected. Alternatively, the Petition falls woefully short of meeting the criteria for a stay.

Respectfully submitted,



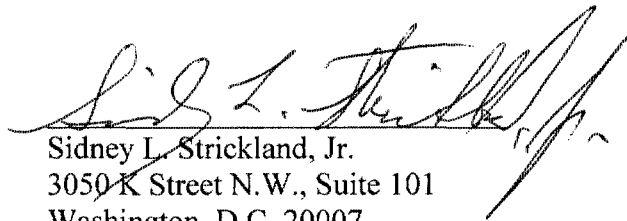
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ATTORNEYS FOR PORTLAND AND  
WESTERN RAILROAD, INC.

## CERTIFICATE OF SERVICE

Portland and Western Railroad, Inc. ("PNWR") by and through its authorized representative, certifies that on July 11, 2006, PNWR sent copies of the foregoing Reply to Petition for Stay, by facsimile transmission and by mailing copies thereof by first-class-mail to: Gordon P. MacDougall, 1025 Connecticut Ave., N.W., Washington, D.C. 20036.



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