

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35187

GRAND ELK RAILROAD, L.L.C.
– LEASE AND OPERATION EXEMPTION –
NORFOLK SOUTHERN RAILWAY COMPANY

Decided: January 29, 2009

This decision denies the petitions of the United Transportation Union (UTU) and Brotherhood of Locomotive Engineers and Trainmen/Michigan Legislative Board (BLET) to stay the exemption noticed in this docket. This decision also addresses the comments filed by Michigan State Senator Raymond E. Basham.

BACKGROUND

On November 3, 2008, a notice invoking the class exemption for lease and operation at 49 CFR 1150.31 was filed in STB Finance Docket No. 35187 by the Grand Elk Railroad, L.L.C. (GER), a noncarrier subsidiary of Watco Companies, Inc. (Watco). By this notice, GER seeks to lease from the Norfolk Southern Railway Company (NS) and to operate approximately 122.9 miles of rail lines in Michigan and Indiana and also to obtain incidental trackage rights over 0.43 miles of track in NS's Botsford Yard. The leased lines run generally between Grand Rapids, MI, and Elkhart, IN.¹ The notice in STB Finance Docket No. 35187 was served on November 17, 2008, and published on the same date in the Federal Register at 73 FR 67927. Also on November 3, 2008, Watco filed a related notice in STB Finance Docket No. 35188 invoking the

¹ Specifically, the lines to be leased and operated are located between: (1) milepost KH 1.4 at Elkhart, IN, and milepost KH 27.4 at Three Rivers, MI; (2) milepost FB 27.3 at Three Rivers, MI, and milepost FB 102.3 at Grand Rapids, MI; (3) milepost KZ 94.25 and milepost KZ 95.0 (Kalamazoo Industrial Track); (4) milepost OW 66.6 and milepost OW 70.24 (Plainwell Industrial Track); (5) milepost XH 88.10 and milepost XH 92.40 (Hastings Running Track); (6) milepost CQ 42.8 and milepost CQ 43.9 (CK&S Industrial Track); (7) milepost KY 0.0 and milepost 3.2 (B O Secondary); (8) milepost UP 0.0 and milepost UP 6.7 (Upjohn Secondary); (9) milepost QY 421.2 and milepost QY 421.3 (Quincy Secondary); (10) milepost VW 106.0 and milepost VW 106.9 (Comstock Industrial Track); (11) milepost AZ 69.6 and milepost AZ 70.4 (Airline Extension); and (12) milepost IJ 44.3 and milepost IJ 44.7 (CK&S Industrial Track), along with the yard tracks in Botsford Yard located between milepost MH 141.8 and milepost MH 142.7. NS will also grant GER incidental trackage rights over approximately 0.43 miles of NS rail line located between milepost 143.03 and milepost 142.6 at Botsford Yard.

class exemption at 49 CFR 1180.2(d)(2) to allow it to continue in control of GER upon GER's becoming a Class III rail carrier. The notice in STB Finance Docket No. 35188 was served on November 17, 2008, and published on the same date in the Federal Register at 73 FR 67927-28, and it became effective on December 3, 2008.² Under the 60-day labor notification provision in 49 CFR 1150.32(e), the lease-and-operation exemption in STB Finance Docket No. 35187 cannot become effective until January 30, 2009.³

By decision served on December 22, 2008, the Board denied a petition for stay filed by the Michigan Economic Development Corporation (MEDC). MEDC had filed its stay request on November 26, 2008. GER had filed in opposition to MEDC's stay request on December 12, 2008, and NS had filed in opposition on December 15, 2008.

On December 22, 2008, UTU filed a petition for stay of the effective date of the exemption in these proceedings.⁴ On December 23, 2008, NS replied in opposition to UTU's petition for stay. GER filed a reply in opposition to UTU's petition for stay on December 24, 2008.

On January 12, 2009, State Senator Basham filed comments asking that the Board require that an environmental impact and public safety study be completed prior to making any final decision. In its reply filed on January 15, 2009, GER addressed the comments of State Senator Basham. While State Senator Basham did not request a stay, the arguments in his pleading and GER's reply thereto have been considered in this decision because they are relevant to the stay criteria.

On January 21, 2009, BLET filed a petition for stay of the effective date of the exemption in these proceedings. On January 23, 2009, GER and NS filed replies in opposition to BLET's petition. Also on January 23, 2009, Marquette Rail, LLC (Marquette) filed a notice containing a settlement agreement with GER involving construction of a direct connection between Marquette and NS track to be leased by GER (thereby avoiding the need for them to connect via an intermediate switching movement over track owned by CSX Transportation, Inc.) and other agreements and stating that it now supports the transaction as beneficial to rail service in the region.

² Watco Companies, Inc. – Continuance in Control Exemption – Grand Elk Railroad, L.L.C., STB Finance Docket No. 35188 (STB served Nov. 17, 2008).

³ GER initially certified its compliance with 49 CFR 1150.32(e) on November 25, 2008, but corrected its certification on December 1, 2008.

⁴ Although the continuance-in-control exemption noticed in STB Finance Docket No. 35188 became effective on December 3, 2008, neither GER nor Watco can exercise control over the NS lines unless and until the lease-and-operation exemption noticed in STB Finance Docket No. 35187 becomes effective and the parties consummate that transaction.

DISCUSSION AND CONCLUSIONS

The requests for a stay will be denied because none of the parties seeking a stay has met the stay criteria. In deciding petitions for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Likelihood of Prevailing on the Merits

The parties seeking a stay argue that they are likely to prevail on the merits because they can show that: (1) the exemption is similar to a prior transaction that was found ineligible for exemption in the Michigan Central case;⁵ (2) the lease would degrade service; (3) the lease would degrade safety; and (4) the lease would result in traffic routing changes and other matters that require environmental analysis. As discussed below, the proponents of a stay have failed to make these showings.

Michigan Central. UTU's principal argument on the merits – that the exemption needs to be stayed to allow increased scrutiny of the transaction to determine whether it is similar to the transaction that was found to be ineligible for exemption in Michigan Central – is unpersuasive.

On its face, the notice shows that the transaction at issue in STB Finance Docket No. 35187 is significantly different from the one involved in Michigan Central and more like typical lease and operation exemptions the Board reviews. Unlike the transaction in Michigan Central, the property in this transaction will be leased to an entity (GER) and that entity appears to be independent of the lessor carrier (NS). As NS points out in its reply, it will have no ownership interest in GER and will receive no share of GER's profits. NS will not have a veto power or any other involvement in the managerial, financial, or operational decisions of GER, and NS will not retain trackage rights over GER's line. GER will make its own separate transportation contracts with its shippers, and GER will have the unrestricted ability to interchange traffic with other carriers with which it physically interconnects. Moreover, this transaction involves only a portion of the 384.5 miles of track and trackage rights that was at issue in the considerably more complex Michigan Central transaction. And UTU has provided no reason to believe that the answers given in response to discovery would be likely to contradict

⁵ Michigan Central Railway, LLC – Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company, STB Finance Docket No. 35063, et al. (STB served Dec. 10, 2007) (Michigan Central).

what is stated in the notice. Thus, UTU has not shown that this transaction will likely be found ineligible for the Board's exemption procedures, as in Michigan Central.

Service and Maintenance. The fact that this transaction is a lease to a subsidiary of an established short line holding company, rather than a sale, undercuts UTU's and BLET's arguments that they could prevail on the merits by showing that the transaction would degrade service. According to GER, the lease contains a provision requiring GER to upgrade and to maintain the line to Federal Railroad Administration (FRA) Class 2 standards;⁶ and the penalty for failure to keep this commitment is termination of the lease, which would reestablish NS's obligation to provide service. GER states that it intends to invest \$8.9 million in start-up capital to upgrade the line and to improve service, listing several upgrades that it says it intends to make in order to improve service, including bridge replacement, track rehabilitation, and rehabilitation of the Botsford and Hugart yards.

Attempting to show that Watco's economic prospects might be too poor to allow GER to raise this start-up capital, UTU, BLET, and State Senator Basham point to a Dunn & Bradstreet (D&B) rating and credit score for Watco Transportation Services. As noted by GER, however, the D&B rating is of questionable usefulness in evaluating Watco's ability to raise funds for upgrading the track of its subsidiary GER because: (1) Watco Transportation Services is a subsidiary of Watco, not Watco itself; and (2) neither Watco nor Watco Transportation Services subscribes, or provides financial information, to D&B. Moreover, even if the Board could assume arguendo that the D&B rating of Watco Transportation Services was accurate and relevant to Watco itself, the parties seeking a stay have failed to address whether GER could raise funds independently of Watco, whether Watco's alleged financial condition is likely to be long-term rather than a temporary condition related to current economic conditions, whether GER could maintain service at existing levels until upgrade funding could be secured, and whether service would decline if the property were not leased to GER. And none of UTU's discovery requests appear directed to Watco's and GER's current financial ability to fund the proposed upgrades, even if such a showing were determinative of whether to allow the exemption to become effective or to revoke, once effective.

State Senator Basham argues that the transaction would degrade service because GER intends to maintain the line at a Class 2 level, providing for a top speed of 25 mph, rather than at the "current NS level of Class 3 with a top speed of 40 mph." GER agrees that it intends to maintain the line at the Class 2 level but responds that the line is, due to its condition, currently maintained at less than the Class 3 level – at the Class 2 level south of Kalamazoo, MI, and at the even lower Class 1 level (10 mph) north of Kalamazoo. GER does not deny that the line is currently in poor condition but responds that it will be making investments that will raise the overall level of the line's condition to the Class 2 level and that these investments would not be necessary if the line were, as alleged by State Senator Basham, currently being maintained at the Class 3 level. GER also states that it intends to use the sums budgeted for upgrades to work with the Michigan Department of Transportation to upgrade the public grade crossings cited by State

⁶ The maximum freight train speed on FRA Class 2 track is 25 mph. See 49 CFR 213.9(a).

Senator Basham and BLET as needing repair. In light of GER's response, proponents have not shown that they are likely to prevail in showing that service would be degraded due to operation of the line at the Class 2 level.

State Senator Basham also predicts that the transaction would result in a degrading of equipment. GER, however, responds that: (a) the "only difference between the equipment used by NS now and the equipment GER will utilize will be the color of the locomotives;" (b) it will open a locomotive repair facility on the line in Grand Rapids; (c) a "GER affiliate" provides mobile locomotive repairs in the area; and (c) it plans on spending \$4,084,000 to acquire and to maintain locomotives on the line so as to improve service. In light of GER's response and the fact that State Senator Basham's allegation of equipment degradation is unsupported, he has not shown that he is likely to prevail in arguing on the merits that equipment would be degraded.

UTU maintains that additional scrutiny is required because MEDC has raised what UTU calls "serious economic concerns about this transaction." BLET cites the concerns of MEDC, as well, which centered on Marquette's access to NS. However, the Board has already refused to delay the effectiveness of the exemption for the reasons advanced by MEDC, and Marquette has reached a settlement agreement regarding future access to NS and now supports the transaction.

Safety.⁷ State Senator Basham argues that Watco's rail subsidiaries are "often among the most unsafe according to Federal Railroad Administration statistics." GER responds that: (1) "... the Watco railroad subsidiaries have some of the best injury records in the industry" according to FRA records; and (2) Watco's subsidiaries have "consistently" been awarded the Jake Certificate Award (for having a "Frequency/Severity Index Rate" less than or equal to the industry average) and the Jake Certificate with Distinction Award (no reportable injuries) from the American Short Line and Regional Railroad Association. According to GER, 14 Watco railroads have won these safety awards in the past 2 years. In light of GER's response and the fact that State Senator Basham's reference to FRA data is vague and unsupported, the record does not show that he would be likely to prevail on the merits of the safety issues that he raises.

Traffic Routing Changes and Environmental Review. State Senator Basham and BLET argue that the transaction would affect the flow of traffic and thereby trigger application of the Board's environmental reporting requirements. These parties raise a number of arguments in support of this view, but their arguments do not show that the parties seeking stay would likely prevail on the merits.

BLET argues that GER has substantially understated the overall annual traffic volume and that, therefore, GER cannot claim that the transaction would not cause traffic to increase above the thresholds that would trigger the Board's environmental reporting requirements.⁸ But BLET's argument that GER has substantially understated the overall annual traffic volume is unsupported. While GER would no doubt attempt to attract to the line all traffic that it could

⁷ The discussion of safety in this decision is also relevant to the public interest criterion for stay, which is specifically discussed below.

⁸ See BLET's Petition for Stay, at 4.

handle, it is currently faced with a declining traffic level due to plant closures and the overall state of the Michigan economy.

State Senator Basham and BLET argue that the transaction would cause a large increase in traffic at Botsford Yard in Kalamazoo and that this would lead to adverse environmental consequences and trigger the thresholds in the Board's environmental regulations for the submission of an environmental report.⁹ Attempting to explain why traffic through Botsford Yard would increase, proponents maintain that, under current NS procedures, traffic is blocked at Elkhart, and the train blocks are then moved to Botsford and Hugart yards where they are held for movement to subsequent destinations. They argue that, after the transaction, traffic that is currently classified at Elkhart for movement to Botsford and Hugart yards would no longer be classified at Elkhart but would be interchanged with GER at Elkhart and transported to Botsford Yard alone for blocking and movement to subsequent destinations. They argue that this change would clog Botsford Yard and cause trains to be backed-up and pulled forward on track overlapping the streets of downtown Kalamazoo.

In reply, GER presents credible reasons why Botsford yard would not see a large increase in traffic in the foreseeable future. GER states that traffic in Botsford yard will actually decline because it will no longer handle westbound traffic to Niles or eastbound traffic to Battle Creek, Jackson, Ypsilanti, Wayne, and other locations. Moreover, GER asserts that traffic will continue to be blocked at Elkhart for Kalamazoo and Grand Rapids and cars destined for the Grand Rapids area will be taken to Hugart Yard for switching, not to Botsford Yard. GER adds that it will handle all southbound traffic in Botsford Yard as NS does today. Finally, GER asserts that its operating plan contemplates keeping as many cars as possible out of Botsford Yard.¹⁰ In light of GER's reply, it is not apparent that BLET would be likely to show on the merits that there would be an increase in traffic at Botsford Yard sufficient to trigger environmental review.

BLET maintains that GER would be operating its trains through Kalamazoo during daylight hours, whereas NS currently runs the majority of this traffic at night, and that this would further interfere with peak hour vehicle traffic in Kalamazoo. GER responds that only two trains per day will operate in Kalamazoo during daylight hours, that those will be used to service local customers, and that the manifest trains destined for Elkhart will pass through Kalamazoo between 3:00 and 4:00 in the morning.

BLET argues that a lease held by NS to operate over certain industrial track owned by the Canadian National Railway Company (CN) in Kalamazoo may expire in April 2009 and that, if it does expire, hazardous materials that are currently handled by CN over this track would be

⁹ (1) an increase of rail traffic of at least 100 percent or an increase of at least 8 trains a day on any segment of the line; (2) an increase in rail yard activity of at least 100 percent; or (3) an average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day. 49 CFR 1105.7(e)(5).

¹⁰ Contrary to what BLET maintains (Petition, at 4), the fact that GER's corporate headquarters will be in Kalamazoo, where Botsford Yard is located, has no bearing on the role of that yard in GER's operating plan.

added to the traffic that is currently handled by Botsford Yard, thereby causing significant environmental impact. But BLET has not offered any explanation of why CN might not renew this 99-year lease or why the transaction in this proceeding would affect the transportation of these materials. NS's lease of CN's industrial track predates the transaction in this proceeding, and BLET has not shown how this proceeding could have any effect on whether NS's lease of CN's industrial track is renewed. GER states that it has not agreed to take over any CN traffic in the area and that any CN traffic moving into Botsford Yard in the future would be caused by a new and different transaction.

For the reasons explained above, proponents have not justified staying the transaction to require environmental reporting. No party has alleged that the lease would cause diversion from rail to motor carriage under 49 CFR 1105.7(e)(4). Lease agreements do not normally require an environmental review unless the environmental thresholds are exceeded. 49 CFR 1105.6(c)(2)(i). The record here does not support the conclusion that the line that is the subject of this transaction will incur an increase in traffic sufficient to trigger the thresholds for environmental reporting under 49 CFR 1105.7(e)(5). For the reasons discussed above, the operational changes that could cause rail traffic levels to increase to such a large extent in the economically distressed area where GER would be operating have not been shown to be likely. Thus, the proposed transaction has not been shown to have enough potential for significant impacts to warrant further environmental review under the National Environmental Policy Act or the Board's environmental rules.

BLET further argues that Botsford Yard is a "known Hazardous Waste Site" and that, accordingly, an environmental report is needed to assess its risk to the public. NS, however, credibly responds that the yard is not a hazardous waste site, identifying the actual hazardous waste site referred-to by BLET as being a site that was created by other parties and that has nothing to do with the yard.¹¹ Accordingly, the transaction does not need to be stayed for environmental analysis pertaining to Botsford Yard.

Irreparable Harm

UTU and BLET allege that their members would suffer irreparable harm absent a stay, but their allegation lacks support. UTU states that an unidentified number of its employees would be displaced and that, absent a stay, it would be "nearly impossible to unscramble the egg of seniority rights and residence changes." GER and NS have responded that GER will be hiring more employees than currently are working on the lines, that labor protection is not provided in these types of transactions, and that any injuries would be economic in nature and compensable through money damages.

BLET states that the lease would cause a net loss of 14 jobs – 72 current jobs allegedly now in the area included in the lease would be lost while GER proposes to hire 58 employees. BLET alleges that some of the 72 current employees would be forced into a long commute to

¹¹ Reply of NS filed on January 23, 2009, at 7-8, and verified as correct by the Board's Section of Environmental Analysis.

other NS jobs. BLET contends that other affected employees would have to relocate outside the state, that the homes of the employees who would have to relocate would be difficult to sell and possibly be subjected to foreclosure, and that the burden of the resulting financial hardship would be borne by the State of Michigan. NS, however, responds that, by its own count, only 42 of its employees have regular positions on the line, and that therefore the lease would not cause a net loss of jobs.

Based on this record, proponents of a stay have failed to meet their burden of showing that their members would suffer irreparable harm if the transaction later was ordered to be undone. Affected employees should be able to obtain jobs with GER or obtain other jobs on NS consistent with their collective bargaining agreements.

Harm to Other Parties

The proponents of a stay have failed to show that a stay would not substantially harm GER, NS, and affected shippers. UTU argues only that the parties to the transaction do not appear to be in a “great rush” to consummate this transaction. UTU observes that the notice of exemption filed in the “related transaction” (apparently in Michigan Central) was filed on July 13, 2007, and that GER’s certificate of compliance with 49 CFR 1150.32(e) was late filed. But the filing date of the petition for exemption in Michigan Central has no bearing on how NS and GER would be affected by delaying a new transaction deemed beneficial to them. Nor does GER’s minor delay in filing its certificate of compliance with 49 CFR 1150.32(e). BLET states only that GER would not be harmed and that NS would not be harmed because it would still retain ownership of the railroad. However, according to GER, any significant delay in the effective date of the lease-and-operation exemption will jeopardize its ability to complete the rehabilitation program during the construction season, to its detriment and the detriment of shippers served on the subject lines. Thus, proponents have failed to meet their burden as to this stay criterion.

Public Interest

Proponents have failed to show how a stay would be in the public interest. Both GER and State Senator Basham agree that portions of the line are in bad physical condition. GER states that it will spend \$2.7 million on track rehabilitation, which will benefit the shipping public. GER will be hiring a substantial number of employees, and any extra employment from track rehabilitation and employment with GER would have a positive effect on the labor market in the area. Moreover, to the extent that the transaction allows GER to attract additional traffic to the lines by operating them at a lower cost and with more attention to the needs of shippers, there will also be more work for employees of other carriers working on connecting lines.

For all the reasons set forth above, the parties seeking a stay have not met the stay criteria and the requests for stay will be denied.

It is ordered:

1. The requests for stay are denied.
2. This decision is effective on its date of service.

By the Board, Charles D. Nottingham, Chairman.

Anne K. Quinlan
Acting Secretary