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SERVICE DATE - SEPTEMBER 12, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34085

KEOKUK JUNCTION RAILWAY COMPANY
– ACQUISITION AND OPERATION EXEMPTION –
WEST END OF TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION

PETITION FOR STAY

Decided: September 11, 2001

Petitioner's request to stay the effectiveness of the exemption in this proceeding will be denied, and its request to reject and revoke the exemption will be decided in a subsequent decision.

BACKGROUND

By notice filed on August 15, 2001, the Keokuk Junction Railway Co. (KJRY) invoked the class exemption at 49 CFR 1150.41 to allow its acquisition of rail lines owned by the Toledo, Peoria and Western Railway Corporation (TP&W), between milepost 108.0 near East Peoria, IL, and milepost 206.0L, near Lomax, IL.¹ By petition filed on August 27, 2001, Joseph C. Szabo, on behalf of the United Transportation Union – Illinois Legislative Board (UTU-IL or petitioner), requests that the Board reject and revoke the exemption and stay its effectiveness.² UTU-IL's petition also stated that it is seeking discovery from KJRY under 49 CFR 1121.2. On August 30, 2001, KJRY replied in opposition to UTU-IL's petition.

¹ The acquisition includes trackage rights over (1) the Union Pacific Railroad Company, between Hollis (milepost 119.28) and Iowa Junction (milepost 113.9) and (2) the Peoria and Pekin Union Railway Company, between Iowa Junction (milepost 113.9) and milepost 109.49.

² By petition filed on August 21, 2001, TP&W requested that we stay the effectiveness of the exemption pending consideration of the petition to reject and to revoke the exemption that it filed on August 20, 2001. TP&W alleged that the notice contains false and misleading information, in that TP&W has not agreed to sell the line to KJRY but has instead agreed to sell a portion of the line to the SF&L Railway, Inc. (SF&L). TP&W also alleged that the line to be purchased generated in excess of \$5 million in annual revenues, thus triggering the requirements of 49 CFR 1150.42(e) that employees on the line be given 60 days' notice of the transaction. On August 20, 2001, SF&L also filed a petition to reject the exemption. By decision served on August 23, 2001, the Board denied TP&W's petition for stay. On August 21, 2001, KJRY filed replies to the petitions to reject and revoke filed by SF&L and TP&W.

DISCUSSION AND CONCLUSIONS

UTU-IL does not present its own grounds for rejection and/or revocation. Instead, it adopts the arguments for rejection/revocation raised in the petitions of TP&W and SF&L. Petitioner adds only that it is considering asking the Board to reopen a proceeding in another docket by which the KJRY acquired a segment of the track at issue,³ a proceeding that has no relationship to the instant docket. UTU-IL's request to reject and revoke will be handled in a subsequent decision, where we will also dispose of the petitions to reject and revoke filed by TP&W and SF&L.

UTU-IL requests that the Board stay the exemption pending resolution of its argument that the line to be purchased generated in excess of \$5 million in annual revenues, thus triggering the requirements of 49 CFR 1150.42(e) that employees on the line be given 60 days' notice of the transaction. According to UTU-IL, TP&W has "determined" in its petition to reject and revoke that the \$5 million threshold will be exceeded. Petitioner claims that KJRY has not provided the requisite 60 days' notice, and that this failure is harming current TP&W employees working on the line.

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits of a request for rejection or revocation; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking stay carries the burden of persuasion. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Under these standards, UTU-IL's request for stay must be denied. First, UTU-IL will not be irreparably harmed in the absence of a stay. As discussed in the decision served on August 23, 2001, denying TP&W's request for stay, the line is subject to a significant property rights dispute that likely will be resolved in a civil court. This dispute will block the transfer of the line to KJRY until it is resolved, even in the absence of a stay.⁴ Further, if it is shown that

³ KNRECO, Inc., d/b/a Keokuk Junction Railway – Acquisition and Operation Exemption – The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 30918 (ICC served Oct. 29, 1987, and Apr. 28, 1988), aff'd sub nom. Simmons v. ICC, 871 F.2d 702 (7th Cir. 1989).

⁴ The nature of the dispute indicates that, in any event, it will last longer than 60 days (the period of notice that would be required if 49 CFR 1150.42(e) applies).

the revenues will exceed \$5 million, the exemption cannot be effective until 60 days after certification that the requisite notice has been given.

Moreover, UTU-IL has not shown that it is likely to prevail on the merits of the \$5 million threshold issue. UTU-IL has merely disputed KJRY's assertion that it will earn less than \$5 million a year by noting that a significant factor in that estimate, an adverse ruling by this agency,⁵ has been appealed by KJRY.⁶ The Board is not likely to find that KJRY would prevail on its petition for review. The only other support UTU-IL offers for its argument is a reference to consultations with the Union's leadership. That conclusory, one-sentence statement does not support a finding that UTU-IL is likely to prevail on a claim that KJRY will earn more than \$5 million annually as a result of this transaction. Of course, there will be no such transaction if a court upholds TP&W's assertion that it has no obligation to sell the line to KJRY. TP&W has stated repeatedly that it is going to sell (or has already sold) the line to SF&L Railway, Inc., not KJRY.

In light of the above, this decision need not address the remaining two stay criteria. Issues concerning the validity of the exemption will be considered when the petitions to reject and to revoke are decided.

⁵ The Burlington Northern and Santa Fe Railway Co.—Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, STB Finance Docket No. 33740 (STB served June 22, 2001).

⁶ Keokuk Junction Railway Co. v. Surface Transportation and United States of America, No. 01-1305 (D.C. Cir. filed July 11, 2001).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU-IL's petition for stay is denied.
2. This decision is effective on its date of service.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary