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SERVICE DATE - LATE RELEASE MAY 28, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34509

KAW RIVER RAILROAD, INC.
– ACQUISITION AND OPERATION EXEMPTION –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY

Decided: May 28, 2004

By notice filed on May 25, 2004, Kaw River Railroad, Inc. (KRR), a noncarrier, seeks to acquire by lease, sublease, and assignment from The Kansas City Southern Railway Company (KCS) and to operate, respectively, 7.5 miles of trackage owned by KCS, 4.5 miles of trackage owned by the Kansas City Terminal Railway Company (KCT) and currently leased and operated by KCS, and 6.2 miles of trackage owned by KCT over which KCS currently possesses operating authority.

On May 27, 2004, the Brotherhood of Locomotive Engineers & Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters (BLET) filed a petition for a stay of the transaction encompassed by KRR's notice of exemption. Among the reasons that it claims that a stay is warranted, BLET asserts that it is likely to prevail on the merits of a forthcoming petition to revoke the exemption. Specifically, BLET states that the Board ultimately should revoke the exemption (and grant the stay it requests here) because the proposed transaction does not require Board approval. In support of its position, BLET argues that the trackage that is the subject of KRR's notice of exemption is excepted switching track under 49 U.S.C. 10906, and, therefore, the formal licensing requirements of 49 U.S.C. 10901 (or any other request for Board approval) to acquire and operate this trackage are inapplicable so that the exemption notice that KRR filed is inappropriate. BLET also argues that railroad employees would suffer irreparable injury in the absence of a stay, that a stay would injure no other parties, and that the public interest warrants a stay. On May 28, 2004, KRR replied in opposition to the stay request.

DISCUSSION AND CONCLUSIONS

An interested party seeking a Board-ordered stay must establish that: (1) there is a strong likelihood that it will prevail on the merits; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) 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). On a motion for stay, “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). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Here, BLET has not met the criteria for a stay. BLET has not come forward with sufficient evidence and argument to convince the Board that it is likely to prevail in its argument that this transaction does not require Board approval due to the nature of the track and its intended use. Indeed, the record indicates that some of the trackage over which KRR would operate is KCS main line trackage and, therefore, is a line of railroad subject to the Board’s exclusive jurisdiction and regulatory authority.

Moreover, even if BLET could establish, as it asserts here, that some or all of the trackage over which KRR would operate could currently meet the definition of excepted yard or switching trackage under 49 U.S.C. 10906, that would not change the fact that KRR would become a common carrier by virtue of the transaction. As proposed by KRR, the transaction would entail a new operation by a new carrier. Because the new operation would constitute KRR’s entire line of railroad, and KRR would be holding out service to the public, it must seek authority under 49 U.S.C. 10901 to provide it. See Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL, STB Finance Docket No. 41986 (STB served Sept. 12, 1997), aff’d sub nom. United Transportation Union-Illinois Legislative Board v. STB, 183 F.3d 606 (7th Cir. 1999).

Because BLET has failed to establish that a stay is warranted, its stay request will be denied.

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

It is ordered:

1. The petition for stay is denied.

2. This decision is effective on its date of service.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary