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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35064

WATCO COMPANIES, INC., AND WATCO TRANSPORTATION SERVICES, INC. –
– CONTINUANCE IN CONTROL EXEMPTION –
MICHIGAN CENTRAL RAILWAY, LLC

STB Finance Docket No. 35065

NORFOLK SOUTHERN RAILWAY COMPANY
– TRACKAGE RIGHTS EXEMPTION –
MICHIGAN CENTRAL RAILWAY, LLC¹

Decided: August 8, 2007

The Board is denying the petition of the Brotherhood of Locomotive Engineers and Trainmen, A Division of the Rail Conference – International Brotherhood of Teamsters (BLET), to stay the effectiveness of the class exemptions that have been invoked in these proceedings. The Board is, however, delaying their effectiveness to coincide with the effectiveness of any exemption that is granted by the Board in the related acquisition exemption proceeding in STB Finance Docket No. 35063.

BACKGROUND

By petition filed on July 13, 2007, in STB Finance Docket No. 35063, Michigan Central Railway, LLC – Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company (MCR Acquisition), Michigan Central Railway, LLC (MCR), requested an exemption, pursuant to 49 U.S.C. 10502, under the Board's formal (case-by-case) exemption procedures at 49 CFR 1121.1 to authorize it to acquire some 299 miles of track in Michigan from the Norfolk Southern Railway Company (NSR), to acquire through assignment from NSR some 85.5 miles of existing trackage rights and lease rights, and to acquire yards and stations that are related to this track. MCR also filed (1) a petition to revoke the otherwise applicable class exemption at 49 CFR 1150.31 for the acquisition and operation of rail lines by a noncarrier, and (2) a proposed procedural schedule.

¹ These proceedings are not being consolidated and are being considered here in one decision for administrative convenience.

Watco Companies, Inc., and its wholly owned subsidiary, Watco Transportation Services, Inc. (collectively, Watco), filed a notice of exemption on July 13, 2007, to continue in control of MCR once it becomes a rail carrier.² If MCR becomes a rail carrier in that docket, it will grant trackage rights to NSR, approval for which was sought in a notice of exemption filed on July 13, 2007.³

By decision and notice served on August 2, 2007, and published on the same date in the Federal Register at 72 FR 42465-66, the Board granted MCR's revocation request, commenced a proceeding to consider MCR's petition for exemption for the proposed transaction noticed in MCR Acquisition, and adopted a procedural schedule for developing the record. The overall transaction in the aforementioned proceedings is summarized in greater detail in that decision and notice.

On July 31, 2007, BLET filed a petition to stay the effectiveness of the exemptions covered by Watco Continuance in Control and NSR Trackage Rights. BLET argues that the Board should not allow the exemptions in these proceedings to take effect before the agency rules on the main transaction at issue in MCR Acquisition. According to BLET, allowing these "ancillary" exemptions to take effect first would "place the burden upon protestants to seek revocation later on" if the Board's final decision in the acquisition proceeding suggests a need to modify the control or trackage rights transactions.

On August 2, 2007, Watco and NSR filed replies opposing BLET's petition for stay, but stating that each would not object to the Board's delaying the effectiveness of its exemption until the Board has ruled on the petition for exemption regarding MCR's proposed acquisition.

DISCUSSION AND CONCLUSIONS

A party seeking a stay must meet the traditional Holiday Tours criteria by establishing 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; 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) (Holiday Tours); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 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'n, 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay carry the burden of persuasion on all of the

² See Watco Companies, Inc., and Watco Transportation Services, Inc. – Continuance in Control Exemption – Michigan Central Railway, LLC, STB Finance Docket No. 35064 (STB served July 27, 2007) (Watco Continuance in Control).

³ See Norfolk Southern Railway Company – Trackage Rights Exemption – Michigan Central Railway, LLC, STB Finance Docket No. 35065 (STB served July 27, 2007) (NSR Trackage Rights).

elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

BLET's request for stay will be denied. BLET has not shown that there is a strong likelihood that it will prevail on the merits of its challenge, as BLET made no effort at all to discuss the merits of the acquisition and operation transaction at issue in that proceeding. It is not just that BLET's arguments on the merits are inadequate; rather, they are simply nonexistent.

BLET has also failed to show that it will suffer irreparable harm, or any harm at all, in the absence of a stay. The ancillary control and trackage rights exemptions that BLET seeks to stay depend entirely on approval of the transaction at issue in MCR Acquisition. MCR can take no action as a railroad under the ancillary exemptions until the main acquisition and operation exemption is approved. Thus, prior to approval of that exemption, the ancillary control and trackage rights exemptions can have no operational effect on, and thus cannot harm, BLET or any other protestant.

There is no merit to BLET's contention that a stay is required to relieve it from the need to seek revocation of the ancillary exemptions if the final decision on the acquisition and operation exemption requires modification of those exemptions. If the control or trackage rights transactions must be modified as a result of the Board's decision in MCR Acquisition, the burden will be on Watco or NSR to obtain approval from the Board for such modification. Protestants will not be required to seek to revoke ancillary exemptions that may be rendered inadequate or inappropriate in light of the agency's decision disposing of the main acquisition and operation transaction.

As noted, however, Watco and NSR have stated in their replies that they would not object to the Board's delaying the effectiveness of the exemptions in these proceedings until the Board has ruled on the petition for exemption involving MCR's proposed acquisition in STB Finance Docket No. 35063. Given the positions of Watco and NSR, the effectiveness of the subject exemptions will be delayed to coincide with the effectiveness of any exemption granted by the Board in STB Finance Docket No. 35063.

It is ordered:

1. BLET's petition for stay is denied.
2. The exemptions in these proceedings will not become effective until the Board rules on the petition for exemption in the MCR Acquisition proceeding (STB Finance Docket No. 35063) and any exemption authorized in that proceeding becomes effective.

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

By the Board, Charles D. Nottingham, Chairman.

Vernon A. Williams
Secretary