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SERVICE DATE - LATE RELEASE JULY 25, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34209

NORFOLK SOUTHERN RAILWAY COMPANY – TRACKAGE RIGHTS EXEMPTION –
DELAWARE AND HUDSON RAILWAY COMPANY – BETWEEN SUNBURY, PA AND
MECHANICVILLE, NY

STB Finance Docket No. 34225

NORFOLK SOUTHERN RAILWAY COMPANY – TRACKAGE RIGHTS EXEMPTION –
READING BLUE MOUNTAIN AND NORTHERN RAILWAY COMPANY – BETWEEN
LEHIGHTON YARD AND DUPONT, PA

Decided: July 25, 2002

The request to stay the effectiveness of the exemptions in these proceedings¹ is being denied. The request for revocation will be considered in a subsequent decision.

BACKGROUND

By separate notices filed in these proceedings on July 5, 2002, pursuant to 49 CFR 1180.2(d)(7) and 1180.4(g), the Norfolk Southern Railway Company (NS) invoked the Board's class exemption to acquire trackage rights over the following lines: (1) approximately 56.7 miles of the Lehigh Line of the Reading Blue Mountain and Northern Railroad Company (RBMN), between milepost 119.3 in Lehighon Yard and milepost 175.5 in Dupont, PA; and (2) approximately 284.6 miles of the Freight Main Line lines of the Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway Company (CP), between NS's connection with CP at milepost 752.0 near Sunbury, PA, and CP's connection with the Guilford Rail System at milepost 467.40 at Mechanicville, NY. Under the class exemption procedures, the notices became effective on July 12, 2002 (7 days after the exemptions were filed), but NS has informed the Board that the transactions covered by the notices will not be implemented operationally until August 24, 2002.

¹ These proceedings have not been consolidated and are being dealt with here in one decision solely for administrative convenience.

By petition filed on July 23, 2002, Samuel J. Nasca, on behalf of the United Transportation Union - New York State Legislative Board (UTU-NY), requests that the Board reject and/or revoke the notices of exemption and stay their implementation until certain issues are resolved. As grounds for rejection, UTU-NY argues that NS contravened 49 CFR 1180.6(a)(7)(ii) by failing to provide documents referenced in the trackage rights agreements attached to the notices, one of which is a Restructuring Agreement executed contemporaneously with the trackage rights agreements. UTU-NY also argues that NS contravened this regulation by redacting certain terms, such as compensation, of an agreement with RBMN which was filed, without first observing Board procedures governing confidentiality.

As grounds for revocation, UTU-NY claims that, under 49 U.S.C. 10502(g), the labor protective conditions imposed in the notices are inadequate. UTU-NY argues that the exempted transactions require the standard level of labor protection for railroad consolidations developed in New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), rather than the standard level of labor protection for trackage rights developed in Norfolk and Western Railway Company – Trackage Rights – Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway, Inc. – Lease and Operate – California Western Railroad, 360 I.C.C. 653 (1980) (Mendocino).² According to UTU-NY, the exempted transactions require New York Dock labor protection rather than Mendocino labor protection because the aforementioned Restructuring Agreement is related to STB Finance Docket No. 33388, where the assets of Consolidated Rail Corporation were divided between NS and CSX Transportation, Inc., subject to New York Dock protection for employees. See CSX Corp. Et Al. – Control – Conrail Inc. Et Al., 3 S.T.B. 196 (1998) (Conrail).

As grounds for stay, UTU-NY maintains that (1) its requests for rejection and/or revocation are likely to succeed on their merits and (2) employees will be irreparably injured if NS is allowed to implement the trackage rights without the prior labor agreement required under New York Dock.

On July 24, 2002, NS filed a reply opposing UTU-NY's request for a stay. NS states that it will address the petition for rejection and revocation shortly. NS also states that, for the sake of resolving certain issues raised by UTU-NY, it will submit a petition for a protective order, together with redacted and unredacted versions of the trackage rights agreements and the Restructuring Agreement.

² The actual benefits are the same under both the New York Dock and the Mendocino employee protection conditions. Under the New York Dock conditions, however, applicants must provide employees with 90 days notice, rather than the 20 days required under Mendocino. Also, under New York Dock, an agreement to implement the details and specific application of the protection must be reached before the transaction is executed, whereas under the Mendocino conditions the transaction may be executed subject to a later implementing agreement.

DISCUSSION AND CONCLUSIONS

The requests for stay will be denied. When NS submits the Restructuring Agreement and the redacted material in the NS/RBMN trackage rights agreement, as it has agreed to do, the basis for UTU-NY's petition to reject the notice should be removed. Accordingly, the analysis here will be addressed to the stay requests as they relate to the petition to revoke the exemptions as it applies to these transactions.

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) (Virginia Petroleum Jobbers). 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).

UTU-NY has not carried this burden. UTU-NY has not shown that there is a strong likelihood that it will prevail in its request for revocation of the exemptions. UTU-NY has not shown or even asserted that the trackage rights transactions at issue were transactions or actions that were specifically approved or directed in Conrail or any of its subsequent general oversight proceedings. While a major restructuring proceeding like the one addressed in Conrail may cause future changes in transportation patterns that make additional changes, including trackage rights, desirable, the Board's approval of the merger does not compel or necessarily lead to those transactions. They must be separately negotiated and approved. That is the case here. UTU-NY has offered no support in its stay petition for its assertion that these trackage rights must be viewed as part of the transaction approved in Conrail.

Nor has UTU-NY shown that its members are likely to suffer irreparable harm in the absence of stay. NS's reply explains that the trackage rights arrangement with CP is designed to allow NS to move over CP lines traffic that is not being moved today under any agreement between the parties. Part of UTU-NY's concerns may be due to a simple misunderstanding that certain existing trackage operations by CP would be supplanted by NS's operations in its own right over CP's line.

UTU-NY asserts that absent a stay there would be a reduction in living standards that could not be remedied by damages at a later date. It is not clear that there would be any loss at all. As explained earlier in this decision, there is no difference between New York Dock and Mendocino economic benefits. Moreover, any economic harm that might occur would not constitute irreparable harm.³ On the other hand, a stay that was later dissolved could deprive the carriers of operational benefits that would not be compensable.

It is ordered:

1. The request for stay is denied.
2. This decision is effective on the date of service.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary

³ In Sampson v. Murray, 415 U.S. 61, 90 (1974), the Supreme Court quoted “the traditional standards of Virginia Petroleum Jobbers” on irreparable injury:

The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.