

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34737

YELLOWSTONE VALLEY RAILROAD, INC. – LEASE AND OPERATION EXEMPTION –  
BNSF RAILWAY COMPANY

Decided: August 9, 2005

This decision denies a petition by John D. Fitzgerald, for and on behalf of the United Transportation Union-General Committee of Adjustment (UTU/GO-386 or Petitioner), to stay the effectiveness of the exemption invoked by a notice filed in this proceeding under 49 CFR 1150.31 by Yellowstone Valley Railroad, Inc. (YVRR).<sup>1</sup>

BACKGROUND

*YVRR's Exemption Notice.* On August 2, 2005, YVRR, a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to lease from BNSF Railway Company (BNSF) and operate two rail lines totaling approximately 171.97 miles. The rail lines are located: (1) between milepost 6.0, near Glendive, MT, and milepost 78.6, near Snowden, MT; and (2) between milepost 0.93, near Bainville, MT, and milepost 100.3, near Scobey, MT. In conjunction with the lease of these rail lines, YVRR would acquire incidental, overhead trackage rights over the BNSF rail lines located between: (1) milepost 78.6, on the BNSF Sidney Subdivision near Snowden, MT, and milepost 0.93, on the BNSF Scobey Subdivision, near Bainville, MT, via the BNSF Glasgow Subdivision between Snowden and Bainville; and (2) milepost 6.0, near Glendive, MT, and milepost 0.0, at Glendive, MT. YVRR further indicates that it plans to consummate the transaction described in its verified notice, and to commence operations, on or about August 15, 2005, and that it intends to hold itself out to provide common carrier rail freight service over the subject rail facilities.

*The Stay Petition.* On August 8, 2005, a request to stay YVRR's exemption was filed by UTU/GO-386. Petitioner argues that a stay is necessary in order that it may secure discovery materials both to supplement its request for stay and to file an appropriate petition under 49 U.S.C. 10502(d) to revoke YVRR's exemption. Petitioner submits that YVRR declined to permit examination of the underlying lease materials in the absence of an order from the Board.

---

<sup>1</sup> This transaction is related to STB Finance Docket No. 34736, Watco Companies, Inc. – Continuance in Control Exemption – Yellowstone Valley Railroad, Inc., wherein Watco Companies, Inc., has concurrently filed a verified notice to continue in control of YVRR upon YVRR's becoming a Class III rail carrier.

Petitioner argues that the proposed lease may not be bona fide and that the lease and related trackage rights are extensive, in that they extend more than 200 miles and connect major channels of commerce. Petitioner maintains that the trackage rights are not truly “incidental” to the lease transaction and thus that the trackage rights should be subject to 49 U.S.C. 11323(a)(6), and mandatory employee protective conditions. Petitioner asserts that employees will be irreparably harmed if the transaction is permitted to go forward. Finally, petitioner argues that a stay is warranted because the precise limits of the Snowden-Bainville and Glendive-area trackage rights are not clear. While the exemption became effective on August 9, 2005, Petitioner urges the Board to stay operation of the exemption before August 15, 2005, when the transaction is scheduled to be consummated.

YVRR filed a reply in opposition to the stay request on August 9, 2005. YVRR argues that the proposed transaction is routine and that UTU/GO-386 has failed to show that a stay is warranted.

#### DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether petitioners are likely to prevail on the merits; (2) whether petitioners 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 is in the public interest. Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). 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 party seeking a stay carries 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).

Because the petitioner has not satisfied the standards for a stay, its petition will be denied.

*The Merits.* Petitioner has not demonstrated a likelihood of success on the merits. Petitioner argues that it is likely to prevail because this transaction has “unusual features.” However, Petitioner does not identify any particular aspects of the transaction between YVRR and BNSF that are “unusual.” Petitioner offers no reason why this transaction is other than a routine lease of two rail lines to a new carrier. The proposed transaction is similar to many others that have been pursued through the class exemption process. The trackage rights at issue appear to be “incidental” to the lease of the two Montana line segments in that they involve grants by BNSF to YVRR of overhead trackage rights that will enable YVRR to operate the lines being leased. The trackage rights between Bainville and Snowden are necessary for YVRR to connect traffic between the two lines they are leasing from BNSF. The trackage rights in the Glendive area are necessary to connect the Glendive-Snowden line to other BNSF lines in the vicinity of Glendive, MT. The situation is clearly distinguishable from those cited by Petitioner where “grants back” of trackage rights by a lessee to a lessor were found not to be “incidental” to a lease transaction.

Petitioner also argues that a stay is necessary to permit time for discovery of YVRR's underlying lease documents. Petitioner claims that YVRR withheld information, and that this fact strongly supports a stay. However, Petitioner has admitted that YVRR was willing to disclose the relevant lease documents, but only on condition of a protective order issued from the Board, because the documents contain confidential information. Petitioner filed a Motion to Compel Discovery on August 5, 2005. In a separate decision, the discovery motion will be granted, subject to an appropriate protective order. Petitioner has raised concerns about the precise limits of the trackage rights. The granting of discovery, subject to a protective order, should clarify the extent of the trackage rights and provide Petitioner with information it seeks to enable it to file a petition to revoke the exemption.

*Harm to Petitioner.* Petitioner argues that the lease agreement is an attempt to allow BNSF to change its collective bargaining agreements without resort to the provisions of the Railway Labor Act. The Board has statutory limitations to its ability to impose labor protection conditions on such a transaction. The labor protection afforded in any acquisition of rail lines (either by sale or lease) depends upon the acquiring entity. Where the acquiring entity is a noncarrier (prior to the sale), no labor protection can be imposed. See 49 U.S.C. 10901(c). Petitioner has alleged that nine employees will be affected by this transaction, but Petitioner has not given detail as to why monetary compensation for employees would be inadequate if the transaction were to go forward and later be overturned.

*Harm to Others.* There is reason to believe that a stay could harm shippers on these lines. Delaying the transaction could have a material, adverse effect on the shippers who will rely on YVRR for rail service.

*The Public Interest.* Petitioner has not demonstrated that a stay would further the public interest. The proposed changes in operations by YVRR are intended to increase efficiency of rail operations in the area, and improve service to shippers. Allowing the transaction to proceed is consistent with Congressional intent, as reflected by laws encouraging the formation of short line and regional carriers to serve the public interest.

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

It is ordered:

1. The stay petition is denied.

2. This decision is effective upon its service date.

By the Board, Roger Nober, Chairman.

Vernon A. Williams  
Secretary