

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33326

I&M RAIL LINK, LLC--ACQUISITION AND OPERATION EXEMPTION--
CERTAIN LINES OF SOO LINE RAILROAD COMPANY
D/B/A CANADIAN PACIFIC RAILWAY

Decided: April 3, 1997

On January 14, 1997, I&M Rail Link, LLC (I&M) filed a notice of exemption under 49 CFR 1150.31 to acquire from Soo Line Railroad Company, d/b/a Canadian Pacific Railway (CPR), and operate approximately 1,109 miles of rail line and 262 miles of trackage rights in Iowa, Illinois, Minnesota, Missouri, Wisconsin, and Kansas. The system to be acquired consists of: (1) CPR's "KC Mainline" between Kansas City, MO, and Pingree Grove, IL, including trackage rights between Pingree Grove and Chicago, IL; and (2) CPR's "Corn Lines" between Sabula and Sheldon, IA, including branch lines and trackage rights in southern Minnesota. The transaction proposed by I&M is referred to as the I&M acquisition transaction, and the exemption noticed by I&M is similarly referred to as the I&M acquisition exemption.¹

On January 10, 1997, the United Transportation Union (UTU) filed petitions to stay and revoke the I&M acquisition exemption. On January 21, 1997, the City of Ottumwa, IA, joined by UTU officials Patrick C. Hendricks and Joseph C. Szabo (Ottumwa),² filed a petition to stay and revoke the I&M acquisition exemption and the related control exemptions in STB Finance Docket Nos. 33327 (the Washington control exemption) and 33328 (the MRL control exemption).³ On January 31, 1997, a petition to revoke the I&M acquisition exemption was submitted for filing by the Transportation•Communications International Union (TCU).⁴

¹ Two related notices of exemption were also filed on January 14, 1997. (1) In STB Finance Docket No. 33327, Dennis Washington, William H. Brodsky, Mort Lowenthal, Dorn Parkinson, J. Fred Simpson, and Thomas J. Walsh filed a notice of exemption under 49 CFR 1180.2(d)(2) to continue to control, through stock ownership and management, two nonconnecting Class II railroads: I&M, which will be a Class II railroad following consummation of the I&M acquisition transaction; and Montana Rail Link, Inc. (MRL), which is already a Class II railroad. (2) In STB Finance Docket No. 33328, MRL filed a notice of exemption under 49 CFR 1180.2(d)(2) to acquire control of I&M following consummation of the I&M acquisition transaction.

² Mr. Hendricks is UTU's Iowa Legislative Director. Mr. Szabo is UTU's Illinois Legislative Director.

³ On January 17, 1997, Messrs. Hendricks and Szabo, acting alone, had filed a petition to stay the related control exemptions.

⁴ Although the TCU petition to revoke was submitted for filing on January 31, 1997, the appropriate fee was not received,
(continued...)

The I&M acquisition exemption was originally scheduled to become effective on February 4, 1997.⁵ By decision served February 3, 1997, however, the effective date of the I&M acquisition exemption was postponed to March 6, 1997, to enable the Board to seek additional evidence and argument on the issues and concerns that the parties had raised so that the Board could make an informed decision. The parties were directed to file, by February 13, 1997, responses to the decision served February 3, 1997. The parties were further directed to file, by February 18, 1997, replies to the responses.

By decision served February 28, 1997, the effective date of the I&M acquisition exemption was further postponed to April 4, 1997, to enable the Board fully to consider the evidence that the parties had submitted and the arguments that they had raised.

By decision served April 2, 1997, the Board: denied the petitions to revoke filed by UTU, TCU, and Ottumwa; directed that notice of the I&M acquisition exemption and the Washington control exemption be published in the Federal Register; dismissed the notice of exemption filed in STB Finance Docket No. 33328; dismissed, as moot, the petitions to stay filed in STB Finance Docket Nos. 33326, 33327, and 33328; dismissed, as moot, the petition to revoke filed by Ottumwa in STB Finance Docket No. 33328; and ordered that the April 2 decision, and also the I&M acquisition exemption and the Washington control exemption, were to be effective on April 4, 1997.

By petition filed April 3, 1997, Ottumwa requests a stay of the April 2 decision, insofar as it would permit the I&M acquisition exemption to become effective, pending judicial review.

DISCUSSION AND CONCLUSIONS

Ottumwa's stay petition will be denied because a stay has not been justified under the applicable criteria. See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (Holiday Tours) (standard recital of the four stay criteria: whether petitioner is likely to prevail on the merits; whether petitioner will be irreparably harmed in the absence of a stay; whether issuance of a stay would substantially harm other parties; and whether issuance of a stay is in the public interest).

Likelihood Of Prevailing On The Merits. Ottumwa contends that it has a strong likelihood of prevailing on the merits. Ottumwa cites, in this regard, the Board's failure to rule on the CPR control matter, which, Ottumwa claims, "is a unique feature of the proceeding." Stay Petition at 2-3.

⁴(...continued)
and the petition was therefore not considered filed until February 14, 1997.

⁵ See 49 CFR 1150.35(e) (a notice of exemption with respect to a transaction that involves the creation of a Class II carrier will be effective 21 days after the notice is filed).

CPR has been given, in connection with the I&M acquisition transaction, the option to acquire a minority (up to 33- $\frac{1}{3}$ %) membership interest in I&M (a membership interest in a limited liability company is equivalent to ownership of common stock in a corporation; a limited liability company's "members" are equivalent to a corporation's stockholders). This option, if exercised, will allow CPR to appoint two of seven managers to I&M's board of managers (a limited liability company's board of managers is equivalent to a corporation's board of directors). CPR has indicated that, in the event it exercises its option, it will seek a declaratory order that its minority interest will not allow CPR to control I&M; and CPR has further indicated that, pending the receipt of such a declaratory order, it will deposit its I&M membership interest into an independent, irrevocable voting trust. In a letter to CPR's counsel dated February 5, 1997 (Control No. 7-97), the Secretary of the Board stated that, in his opinion, the draft voting trust submitted as an attachment to CPR's counsel's letter dated January 29, 1997, will effectively insulate CPR from unlawful control of I&M insofar as exercise of the membership interest option is concerned.

In the April 2 decision, the Board made clear that it expects that CPR will adhere to its originally stated intentions respecting a declaratory order and a voting trust. The Board therefore rejected CPR's recent suggestion, as set forth in its response filed February 13, 1997, at 2 n.2, that the Board should address, in the April 2 decision, the control implications of its option. The Board also noted, in the April 2 decision, that if and when a declaratory order proceeding is commenced to address the control implications of CPR's option to acquire a minority membership interest in I&M, all interested persons (including UTU, TCU, and Ottumwa) will have an opportunity to submit, for the record in that proceeding, evidence and argument with respect to the control implications of that option. The Board further noted, in the April 2 decision, that it will evaluate the implications of CPR's minority interest at such time as CPR institutes a declaratory order proceeding; and, if the Board determines that such an interest, either alone or in combination with other factors, would allow CPR to control I&M, CPR will be required to divest itself of that interest or to obtain authority from us to exercise that control.

If CPR exercises its option, it will put its I&M ownership interest in a voting trust, and, pending a decision on a declaratory order request, it will keep its I&M ownership interest in that voting trust; and, as long as that interest remains in that trust, CPR *will not* exercise control over I&M. If the Board ultimately determines, in the declaratory order proceeding, that CPR's I&M ownership interest would allow CPR to control I&M within the meaning of 49 U.S.C. 11323, the Board will require CPR either to divest itself of that interest or to obtain authority under 49 U.S.C. 11323 et seq. to exercise that control. Ottumwa's claim that the Board has "failed to carry out its responsibilities to the public by rendering a determination [with respect to the control implications of CPR's option to acquire a minority membership interest in I&M] prior to allowing the [I&M acquisition] transaction to proceed," Stay Petition at 3, is without merit.

Irreparable Harm. Ottumwa contends that the I&M acquisition transaction is projected to have a significant job displacement at Ottumwa, with some 72 employees losing employment or forced to relocate to another and more distant community. Ottumwa further contends that, apparently on account of these job losses, there will be "a massive threat to business and community interests at Ottumwa with job displacement." Stay Petition at 1-2.

Ottumwa has failed to make the requisite showing of irreparable harm. Although Ottumwa may experience a short-term reduction in employment as a result of I&M's not establishing Ottumwa as a crew change point, the record shows that I&M will employ on the Subject Lines⁶ at least as many employees as, if not more employees than, CPR currently employs, and that any loss to the City of Ottumwa will be at least, if not more than, offset by the gain to the City of Davenport (the new crew change point). In addition, Ottumwa will benefit from improved rail service, which should result in increased employment over time.⁷

Harm To Other Parties. Ottumwa contends that a stay will not harm other parties. CPR, Ottumwa claims, will not be injured by a stay, because the Subject Lines have not been operated at a loss. The shippers supporting the I&M acquisition transaction, Ottumwa adds, will not be injured either, because they will continue to have CPR service pending judicial review. Stay Petition at 2.

As demonstrated by the numerous shipper and community letters submitted in Exhibit B to I&M's response filed February 13, 1997, a stay will have a material, adverse effect on shippers and communities located on the Subject Lines. Many of the more than 20 shipper letters submitted in Exhibit B indicate that the uncertainty created by the initial stay jeopardized the efficient movement of spring grain and other commodities. Communities also have weighed in, asking the Board to lift the initial stay so that their businesses and economies, many of them so dependent on the railroad, can resume normal operations.

Furthermore, the evidence of record establishes that further delay in consummating the I&M acquisition transaction could cause I&M significant financial harm; could jeopardize financing; could result in a loss of business that may not be recoverable; would cause uncertainty among lenders, employees, and shippers; and would prevent the realization of the economic benefits from the I&M acquisition transaction.

The Public Interest. Ottumwa claims that the public interest strongly supports a stay of the I&M acquisition transaction. Ottumwa cites, in this respect, the interest of the 72 jobs at Ottumwa "along with the impact upon the community." Stay Petition at 3-4.

⁶ The term "Subject Lines" is defined in the Appendix to the April 2 decision.

⁷ Ottumwa correctly notes that, in the April 2 decision, the Board did not mention that the I&M acquisition transaction has been opposed both by the City of Dubuque and by the Attorney General of Iowa. Stay Petition at 2. Their opposition, however, neither constitutes nor even demonstrates irreparable harm.

To the contrary, as the Board noted in the April 2 decision, consummation of the I&M acquisition transaction will allow rail service on the Subject Lines to be provided by someone who wanted to acquire these lines rather than by someone who wanted to sell them, which clearly is in 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 petition for stay pending judicial review, filed April 3, 1997, by Ottumwa, is denied.

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

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary