

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35187

GRAND ELK RAILROAD, L.L.C.
– LEASE AND OPERATION EXEMPTION –
NORFOLK SOUTHERN RAILWAY COMPANY

Decided: December 22, 2008

This decision denies the petition of the Michigan Economic Development Corporation (MEDC) to stay the exemption noticed in STB Finance Docket No. 35187.

BACKGROUND

On November 3, 2008, a notice invoking the class exemption for lease and operation at 49 CFR 1150.31 was filed in STB Finance Docket No. 35187 by the Grand Elk Railroad, LLC (GER), a noncarrier subsidiary of Watco Companies, Inc. (Watco). By this notice, GER seeks to lease from the Norfolk Southern Railway Company (NS) and to operate approximately 122.9 miles of rail lines in Michigan and Indiana and also to obtain incidental trackage rights over 0.43 miles of track in NS's Botsford Yard. The leased lines run generally between Grand Rapids, MI, and Elkhart, IN.¹ The notice in STB Finance Docket No. 35187 was served on November 17, 2008, and published on the same date in the Federal Register at 73 FR 67927. Also on November 3, 2008, Watco filed a related notice in STB Finance Docket No. 35188 invoking the class exemption at 49 CFR 1180.2(d)(2) to allow it to continue in control of GER upon GER's

¹ Specifically, the lines to be leased and operated are located between: (1) milepost KH 1.4 at Elkhart, IN, and milepost KH 27.4 at Three Rivers, MI; (2) milepost FB 27.3 at Three Rivers, MI, and milepost FB 102.3 at Grand Rapids, MI; (3) milepost KZ 94.25 and milepost KZ 95.0 (Kalamazoo Industrial Track); (4) milepost OW 66.6 and milepost OW 70.24 (Plainwell Industrial Track); (5) milepost XH 88.10 and milepost XH 92.40 (Hastings Running Track); (6) milepost CQ 42.8 and milepost CQ 43.9 (CK&S Industrial Track); (7) milepost KY 0.0 and milepost 3.2 (B O Secondary); (8) milepost UP 0.0 and milepost UP 6.7 (Upjohn Secondary); (9) milepost QY 421.2 and milepost QY 421.3 (Quincy Secondary); (10) milepost VW 106.0 and milepost VW 106.9 (Comstock Industrial Track); (11) milepost AZ 69.6 and milepost AZ 70.4 (Airline Extension); and (12) milepost IJ 44.3 and milepost IJ 44.7 (CK&S Industrial Track), along with the yard tracks in Botsford Yard located between milepost MH 141.8 and milepost MH 142.7. NS will also grant GER incidental trackage rights over approximately 0.43 miles of NS rail line located between milepost 143.03 and milepost 142.6 at Botsford Yard.

becoming a Class III rail carrier. The notice in STB Finance Docket No. 35188 was served on November 17, 2008, and published on the same date in the Federal Register at 73 FR 67927-28.

The control exemption in STB Finance Docket No. 35188 took effect on December 3, 2008. Under the 60-day labor notification provision in 49 CFR 1150.32(e), however, the lease-and-operation exemption in STB Finance Docket No. 35187 cannot take effect until January 30, 2009.² Neither GER nor Watco can exercise control over the NS lines unless and until the lease-and-operation exemption becomes effective and the parties consummate that transaction.

By letter dated November 26, 2008, MEDC filed an “urgent request to stay action” on the lease proposal, apparently in the belief that the lease-and-operation exemption in STB Finance Docket No. 35187 would become effective on December 3, 2008, rather than January 30, 2009.

On December 12, 2008, GER filed a reply in opposition to MEDC’s request for stay. On December 15, 2008, NS filed a reply in opposition to MEDC’s request for stay.³

DISCUSSION AND CONCLUSIONS

In deciding petitions for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish 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); Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

MEDC’s request for stay will be denied because MEDC has not met, or even discussed, the criteria for granting a stay. MEDC’s sole justification for stay is to allege that the transaction would harm shippers by eliminating a connection between Marquette and NS at Grand Rapids, MI. The factual basis for this allegation is questionable in light of the statements in GER’s and NS’s replies that there is currently no direct physical connection between Marquette and NS at Grand Rapids and that what little traffic moves between these carriers must do so via an intermediate switch over track owned by CSX Transportation, Inc. (CSXT), subject to an interchange commitment fee charged by CSXT. GER also points out that it simply would replace NS in any potential movements over this route, as would normally be the case when a new short line is created. On this record, MEDC has not shown that any shipper would suffer

² GER initially certified its compliance with 49 CFR 1150.32(e) on November 25, 2008, but corrected its certification on December 1, 2008.

³ In its reply, NS states that it is also replying to a request for stay contained in a letter filed by Marquette Rail, LLC (Marquette) on the same date that MEDC filed its request for stay. In its letter, however, Marquette did not actually request a stay but stated that it will subsequently be seeking one.

irreparable harm in the absence of a stay or that it is likely to prevail on the merits if it were to petition to revoke the exemption.

It is ordered:

1. MEDC's request for stay is denied.
2. This decision is effective on its date of service.

By the Board, Charles D. Nottingham, Chairman.

Anne K. Quinlan
Acting Secretary