

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35019

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD, LLC–LEASE AND  
OPERATION EXEMPTION–CERTAIN ASSETS OF NORFOLK SOUTHERN RAILWAY  
COMPANY AND CHAUTAUQUA, CATTARAUGUS, ALLEGANY AND STEUBEN  
SOUTHERN TIER EXTENSION RAILROAD AUTHORITY

[REQUEST FOR WAIVER OF 49 CFR 1150.42(e)]

Decided: June 26, 2007

On May 17, 2007, Western New York and Pennsylvania Railroad (WNYP), a Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to lease from Chautauqua, Cattaraugus, Allegany and Steuben Southern Tier Extension Railroad Authority (STERA), and Norfolk Southern Railway Company (NSR), and to operate approximately 98.3 miles of rail line extending between Machias Junction, NY, and Driftwood, PA, in Cattaraugus County, NY, and McKean, Potter and Cameron Counties, PA (the line).<sup>1</sup> The end points of the line are as follows: (1) between milepost BR 44.7 and milepost BR 134.0 (the Buffalo Line); (2) between milepost FV 0.0 and milepost FV 6.6 (the Farmer’s Valley Secondary Line); and (3) between milepost YS 114.5 and milepost YS 116.9 (the Olean Branch).

By petition filed on May 22, 2007, the United Transportation Union-New York State Legislative Board (UTU-NY) requests that the Board reject WNYP’s notice of exemption for failure to meet the requirements of 49 CFR 1150.42(e).<sup>2</sup> UTU-NY notes that WNYP was required to notify the Board at least 60 days prior to the proposed effective date of the exemption

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<sup>1</sup> STERA owns the portion of the line located in Cattaraugus County. NSR owns the portion of the line located in McKean, Potter, and Cameron Counties, and is the current operator of the entire line. In accordance with the lease provisions, the lease term is 14 years, with a renewal term of 10 years, which may be terminated by either party prior to the end of the term.

<sup>2</sup> Under 49 CFR 1150.42(e), “If the projected annual revenue of the rail lines to be acquired or operated, together with the acquiring carrier’s projected annual revenue, exceeds \$5 million, the applicant must, at least 60 days before the exemption becomes effective, post a notice of applicant’s intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) and serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and certify to the Board that it has done so” (emphasis added).

that the required notice had been given to employees. Alternatively, UTU-NY requested, in the May 22 petition, that the Board stay the effective date of the exemption until July 16, 2007.

On May 25, 2007, WNYP filed a request for waiver of the requirement that it certify to the Board at least 60 days prior to the effective date of the exemption that it has complied with the requirements of 49 CFR 1150.42(e). Stating that it served by mail the national offices of all labor unions with employees on the line with a copy of a notice of its intent to undertake this transaction and posted such notice at the workplace of the employees on the affected line on April 18, 2007, WNYP asks that the exemption in this proceeding be permitted to become effective on June 25, 2007. UTU-NY opposes the waiver request.

On June 1, 2007, the Board served, and on June 6, 2007, the Board published in the Federal Register (72 FR 31365), a notice of WNYP's proposed transaction (June notice). The June notice stated that, unless WNYP's waiver request was granted, the "earliest this transaction may be consummated will be 60 days after certification of compliance with the requirements of 49 CFR 1150.42(e) is received by the Board."

On June 4, 2007, counsel for WNYP filed a letter certifying that the labor notice had been posted and served in compliance with 49 CFR 1150.42(e) (June 4 certification letter). WNYP also requested that the Board consider May 17, 2007, as the date of certification.

In a supplement filed on June 11, 2007, UTU-NY argues that WNYP's June 4 certification letter is not credible because it was made by WNYP's counsel and does not include the posting details. UTU now also argues that WNYP's May 17 notice of exemption did not serve as effective certification to the Board. Thus, UTU-NY argues that the Board should stay operation of the notice of exemption until the required employee notice period has run, and pending disposition of the petition to revoke UTU-NY intends to file. UTU-NY also requests that the Board republish the June notice because it did not advise the public of the consummation date for the transaction. WNYP replied on June 14, 2007.

## DISCUSSION AND CONCLUSIONS

### Request for Waiver of 49 CFR 1150.42(e)

As noted above, 49 CFR 1150.42(e) requires both timely notice to employees and timely certification to the Board that such notice was given. Here, although WNYP timely notified affected employees (and, as required, the national offices of the union), WNYP did not so certify to the Board until June 4, 2007. The Board has consistently interpreted 49 CFR 1150.42(e) to include certification to the Board 60 days before the proposed effective date of the exemption. WNYP has not explained why it failed to comply with the certification requirement until June 4 or why the Board's rules should not be enforced here. When a request for waiver of the certification requirement has been opposed, we have looked at all of the facts surrounding the waiver request. We will generally not grant an opposed waiver request unless the movant demonstrates that there are benefits to closing the proposed transaction sooner than full

compliance with the Board's rules would permit.<sup>3</sup> WNYP has made no such showing here. Accordingly, WNYP's waiver request will be denied.

Despite UTU-NY's position to the contrary, WNYP's June 4 certification letter does meet the 49 CFR 1150.42(e) Board certification requirement, which does not require that labor notice certification include posting details. Thus, June 4, 2007 will be used as the certification date for compliance with 49 CFR 1150.42(e), and the exemption therefore will not become effective until August 3, 2007.

### Request for Stay

In light of the Board's action denying waiver of the 60-day certification requirement of 49 CFR 1150.42(e), UTU-NY's request for stay until the 60-day period has run is moot. As noted above, the notice of the exemption is not due to become effective, until August 3, 2007. UTU-NY has not provided justification for a stay beyond that date.<sup>4</sup> UTU-NY is free to file a petition to revoke the exemption, but it has not justified its request that we stay the exemption until a petition to revoke has been filed and acted upon.

UTU-NY's petition to reject WNYP's notice of exemption on the grounds that WNYP did not comply with 49 CFR 1150.42(e) will also be denied. As discussed above, WNYP has complied with the Board requirements of 49 CFR 1150.42(e) as of June 4, 2007.

Finally, the June notice will not be reissued. The June notice was not misleading in any way. The June notice did not definitively set the effective date, given the posture of the case, but

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<sup>3</sup> See, e.g., City of Tacoma, Department of Public Utilities, Beltline Division d/b/a Tacoma Rail or Tacoma Municipal Beltline or TMBL—Acquisition and Operation Exemption—Lakeview Subdivision, Quadlok-St. Clair, and Belmore-Olympia Rail Lines in Pierce and Thurston Counties, WA, STB Finance Docket No. 34555 (STB served Sept. 27, 2004); and Reading Blue Mountain and Northern Railroad Company—Lease and Operation Exemption—Norfolk Southern Railway Company and Pennsylvania Lines LLC, STB Finance Docket No. 34048 (STB served Aug. 1, 2001).

<sup>4</sup> A party seeking a stay must 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). In addition, a party seeking a stay carries the burden of persuasion on all the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). UTU-NY has not shown that the employee impacts here are likely to support a successful petition to revoke (were UTU-NY to file such a petition), nor has UTU-NY included any discussion of the other required elements.

it clearly told the public what to expect: that the effective date would be determined either by the timing of WNYP's certification or the Board's action on the waiver request. The exemption could not become effective and the transaction could not be consummated until 60 days after WNYP certified to the Board that WNYP has complied with the requirements of 49 CFR 1150.42(e) unless the Board established some other effective date (by granting the waiver request in whole or in part). The effective date was not certain at the time of the June notice, but it has been identified in this decision.

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

It is ordered:

1. WNYP's request for waiver is denied.
2. UTU-NY's request for stay is denied.
3. UTU-NY's petition to reject is denied.
4. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary