

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33290

SAULT STE. MARIE BRIDGE COMPANY--ACQUISITION AND OPERATION
EXEMPTION--LINES OF UNION PACIFIC RAILROAD COMPANY

Decided: January 24, 1997

On December 30, 1996, Sault Ste. Marie Bridge Company (SSMB), a Class III common carrier by rail, filed a notice of exemption under 49 CFR 1150.41, et seq. to acquire and operate rail lines of Union Pacific Railroad Company (UP) in the Upper Peninsula of Michigan and northern Wisconsin (the "Duck Creek North Lines"). The rail lines to be acquired by SSMB total approximately 220 miles. On January 6, 1997, Inland Steel Company (Inland Steel) and LTV Steel Company, Inc, (LTV) (collectively, Inland Steel and LTV or protestants) filed a petition to stay the effectiveness of the notice of exemption pending a ruling on protestants' simultaneously filed petition to revoke the exemption or reject the notice of exemption.¹ SSMB and UP replied. The petition for stay will be denied.

BACKGROUND

SSMB is a corporation chartered under the laws of the State of Michigan and the Dominion of Canada and, as noted, is a Class III common carrier by rail. Since 1887, SSMB has owned the international railroad bridge over the St. Mary's River between Sault Ste. Marie, MI and Sault Ste. Marie, Ontario, Canada. See Sault Ste. Marie Bridge Co., 108 I.C.C. 342 (1926). SSMB is now a wholly owned subsidiary of Wisconsin Central Transportation Corporation (WCTC). Wisconsin Central Ltd. -- Control Exemption -- Sault Ste. Marie Bridge Company, Finance Docket No. 31167 (ICC served Dec. 23, 1987 and Mar. 25, 1988). WCTC also controls Wisconsin Central Ltd. (WCL), a Class II common carrier by rail that owns approximately 2000 route miles of rail line in the States of Wisconsin, Illinois, Michigan and Minnesota. Finally, WCTC controls Fox Valley & Western Ltd. (FVW), a Class II common carrier by rail that owns approximately 500 miles of rail line within the State of Wisconsin. See Wisc. Central Transp. Corp. - - Control, 9 I.C.C.2d 233 (1992), reopening denied, 9 I.C.C.2d 730 (1993).

Pursuant to the agreement between SSMB and UP, SSMB will acquire UP's Duck Creek North Lines extending north from Green Bay, WI into the Upper Peninsula of Michigan, as follows:

- 1) The Escanaba Subdivision, extending from milepost 4.0 near Duck Creek, WI to LS&I milepost 74.50 at Ishpeming, MI, a

¹ The notice became effective on January 20, 1997. By letter dated January 14, 1997, the SSMB stated that it would refrain from consummating the acquisition until January 24, 1997. The Board therefore retains jurisdiction to preclude this transaction from taking effect.

distance of 178.25 miles. There are milepost equations at Menominee, MI, where milepost 116.49 = milepost 117.00. Trackage between Negaunee, MI and Ishpeming is owned and operated jointly by UP, WCL and the Lake Superior & Ishpeming Railroad Company (LS&I). Reflecting this arrangement, changes in milepost numbering occur at West Wye near Negaunee, where milepost 176.85 and WCL milepost 164.49 designate the same point, and again at Euclid Avenue Yard in Ishpeming, where WCL milepost 170.70 and LS&I milepost 73.79 designate the same point. The Escanaba Subdivision includes industry trackage at Menominee/Marinette jointly owned or operated with the Escanaba & Lake Superior Railroad Company (E&LS).

2) The Iron Mountain Branch, extending from milepost 0.0 at Powers, MI (connection with the Escanaba Subdivision) to milepost 30.24 at Antoine, MI, a total distance of 32.01 miles. The Iron Mountain Branch includes 1.30 miles of trackage rights over E&LS between UP mileposts 28.45 and 29.60 at Antoine, and a 1.62-mile industrial park spur at Antoine.

3) The Niagara Industrial Lead, extending from milepost -0.40 at Quinnesec, MI (connection with the Iron Mountain Branch) to milepost 3.75 at Niagara, WI, a distance of 4.15 miles.

4) The Palmer Industrial Lead, extending from milepost 0.00 at Cascade (connection with the Escanaba Subdivision) to milepost 6.06 at Palmer, MI, a distance of 6.06 miles. The Palmer Industrial Lead currently is out of service.

SSMB states that it will also acquire by assignment from UP trackage rights over the LS&I between Eagle Mills Jct. and Eagle Mills, MI, a distance of approximately 3 miles; between Empire Junction and Empire Mine, MI, a distance of approximately 2 miles; and over FVW between Duck Creek and Green Bay a distance of approximately 4 miles. SSMB avers that these trackage rights have long been operated as an integral part of the Duck Creek North Lines.

The proposed transaction also includes SSMB's purchase and operation of UP's Escanaba Ore Dock facilities on Lake Michigan at Escanaba. There, iron ore received by rail is stored and transferred to lake vessels for subsequent movement on the Great Lakes. SSMB asserts that a grant of this exemption will result in improved service to shippers, both in terms of frequency and transit times.

The protestants are two steel companies whose manufacturing operations use substantial volumes of iron ore. Protestants obtain a significant portion of their iron ore from the Empire Mine near Palmer, MI. Inland Steel is a 40% equity owner of that mine, as well as of the associated plant, which processes raw ore (called "taconite") into iron ore pellets for shipment to steel mills. The other partners in the Empire Mine and their respective shares are LTV at 25%, Cleveland-Cliffs Iron Company (CCI) at 22.5%, and Wheeling-Pittsburgh Steel Corp. (WPSC) at 12.5%.

Inland Steel and LTV together ship over five million net tons of iron ore per year from the Empire Mine to steel mills in East Chicago, IN, at the southern tip of Lake Michigan. Almost

all of that iron ore moves by rail over a 63-mile UP rail line, commonly referred to as the "Ore Division," which runs from the mine to the port of Escanaba. That line is part of the Duck Creek North Lines. At Escanaba, the ore is transloaded into vessels for subsequent movement to the East Chicago mills.

The Empire Mine is served by two railroads: UP and the LS&I. The LS&I carries ore from the mine to nearby Marquette, MI docks on Lake Superior for transload to vessels for lake shipment. UP moves ore to the Escanaba Ore Dock on Lake Michigan for lake shipment under a 30-year contract with CCI² that expires in April 1999. SSMB states that it "will step into UP's shoes with respect to the contract."³

Protestants state that they are totally dependent on rail service for the movement of their ore from the Empire Mine. Trucks are not feasible due to the distances and volumes involved. The protestants state that there is a competitive all-rail route, chiefly over the lines of the WCL. While the protestants describe the all-rail service as "little used", they state that WCL recently submitted a competitive rate quote to Inland for the all-rail haul. Inland Steel and LTV argue that acquisition of the Ore Division by SSMB will give WCL control over both routings for protestants' shipments, thus leaving protestants without a viable competitive alternative.

Inland Steel and LTV note that LS&I carries ore from the Empire Mine to the Marquette ore docks, where it may be transloaded onto lake vessels. But the protestants claim that this is not an adequate competitive alternative to the joint rail/water route through Escanaba. The steel manufacturers claim (verified statement of B.A. Klimek at 4) that existing use of the Marquette facility by other customers consumes 7.5 million tons of the facility's 9.5 million ton capacity. Inland Steel and LTV ship 5 million tons a year (protestant's petition at 2), two and a half times the available capacity of Marquette. In addition, the protestants state that the Lake Superior route is closed 2½ months of the year due to ice and that the Marquette route is costlier than the Escanaba route or the all-rail alternative.

POSITIONS OF THE PARTIES

Inland Steel and LTV argue that the transaction is a sham and that the Board's exemption procedures should not be made

² Inland Steel and LTV filed letters on January 16, 1997, stating that CCI and WPSC have authorized Inland Steel and LTV to state that they fully support the "entire filing made by Inland and LTV on January 6, including specifically the Petition for Stay."

³ SSMB states that Inland Steel and LTV, the only parties to this proceeding, are not parties to the ore contract. As such, they question whether protestants actually have standing here. However, we note that SSMB's arguments against a stay order hinge, in part, on Inland Steel and LTV's shipments being made under the contract. Since, in essence, all parties agree that Inland Steel and LTV shipments are made under this contract, we will not entertain further SSMB arguments relating to whether Inland Steel and LTV have standing to assert arguments about the competitive impacts of this transaction.

available for this transaction.⁴ Inland Steel and LTV claim that SSMB is a shell company being used by the real purchaser, WCL, to evade the Board's exclusion of Class II and larger carriers from the use of the class exemption. The protestants cite WCL's publicly-stated intentions to acquire the lines; WCL's approaching the shippers to support its acquisition of UP's line; SSMB's lack of employees and lines prior to filing the notice of exemption; and the 170-mile distance between SSMB's rail properties and the UP's lines being acquired.

Inland Steel and LTV argue that SSMB is a part of the family of carriers owned by WCTC and that this relationship should be acknowledged. The protestants also assert that, for that reason, the prior competitive relationship between WCL and UP will not be continued between WCL and its affiliate, SSMB. For these reasons, protestants argue that the transaction does not qualify for the class exemption and therefore that the notice is void and should be rejected.

Inland Steel and LTV also argue that the line sale will have significant anti-competitive impacts on their transportation alternatives. Protestants cite Union Pacific Corporation, et al.--Control and Merger--Southern Pacific Rail Corporation et al., Finance Docket No. 32760 (STB served Aug. 12, 1996, at 121-24) for the proposition that, if a shipper is threatened with the loss of competition by a merger of the only two carriers serving that shipper, it must be protected through appropriate conditions such as trackage rights. Protestants believe that the proposed sale of the Ore Division to SSMB presents just such a case, and justifies similar relief. Protestants further argue that this proposal is outside the intended scope of the class exemption. Therefore, the exemption should be revoked so that the competitive issues raised may be afforded the greater scrutiny that the Board meant to reserve for larger rail combinations.

Inland Steel and LTV's rationale for the stay appears to be that the transaction, "once implemented, . . . can be exceedingly difficult to undo." Petition for stay at 3. Inland Steel and LTV do not oppose the sale of the Ore Division, nor do any of their pleadings request that the transaction be denied. Instead, protestants ask "that the Board, following revocation of the exemption, condition any subsequent approval of the acquisition under §10902 on WCL/SSMB's agreement to grant trackage rights over the Ore Division and associated transloading facilities to an independent third-party carrier, on reasonable terms, so that the availability of a competitive alternative for all of protestants' iron ore traffic may be preserved." Petition to revoke at 17. Finally, Inland Steel and LTV state that "a modest delay of the closing date in order to afford the Board and the parties adequate time to resolve the issues raised in this proceeding should not cause undue hardship for WCL/SSMB" Petition for stay at 3.

In response, SSMB and UP contend that protestants' sham and competition arguments are meritless. SSMB and UP argue that, upon closing this transaction, SSMB will remain a separate corporation, will receive no financial guarantees from WCTC, WCL,

⁴ Inland Steel and LTV incorporate the facts and arguments from their petition to reject and revoke into their stay petition.

or SSMB's other sister subsidiaries, will acquire the UP lines in its own name, and will have its own employees and operating management.⁵

SSMB and UP also assert that WCL's all-rail route is not, in fact, a viable competitive alternative. SSMB and UP point out that neither Inland or LTV has ever used an all-rail routing for its traffic and that protestants' facilities at East Chicago are not even set up to receive iron ore by rail.

SSMB and UP also claim that numerous parties would be adversely affected by a stay. SSMB and UP say that they are currently poised to close the transaction and that every day of delay will cost SSMB approximately \$300,000 in lost revenues. SSMB reply at 10. SSMB and UP add that a stay would interrupt the process at a critical stage, create uncertainty for employees and shippers, and deprive the latter (the vast majority of which support this transaction) of the benefits to be achieved from the proposal.

Finally, SSMB and UP point out that protestants will not suffer immediate and irreparable harm if the acquisition is not stayed. Both Inland and LTV ship coal from the Empire Mine to Escanaba pursuant to a rail transportation contract that does not expire until April, 1999. Thus, the rates that protestants pay to ship ore from their mine to Escanaba are assured for more than 2 years.

In contrast, SSMB asserts that, if the transaction closes, it stands ready to enter into a new long-term contract that would afford protestants immediate and substantial rate relief, improved service, and new equipment for ore shipped from the Empire Mine to the Escanaba Ore Dock. Under these circumstances, SSMB submits that it is only if a stay is granted that Inland Steel and LTV will suffer any imminent harm. SSMB reply at 7-8.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other interested parties; and (4) whether issuance of a stay is in the public interest. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (Holiday Tours). The burden of persuasion on each of these elements lies with Inland Steel and LTV, the parties seeking the relief of a stay. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). In their stay petition, protestants neither refer to nor discuss in any detail the Holiday Tours criteria.

Prior ICC and court precedent makes clear that the threat of harm warranting a stay must be both irreparable and imminent:

An administrative order is not ordinarily stayed without an appropriate showing of irreparable harm. Permian Basin Area Rate Cases, 390 U.S. 747, 777

⁵ V.S. of Thomas F. Power, Jr., WCTC Executive Vice President and Chief Financial Officer.

(1968). A claim of speculative harm is not enough to support relief. The party seeking a stay is required to demonstrate that the injury claimed is imminent, "certain and great." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1995)[.]

Consolidated Rail Corporation--Abandonment--Between Corry and Meadville, in Erie and Crawford Counties, PA, Docket No. AB-167 (Sub-No. 1139) (ICC served Oct. 5, 1995) at 7. The record establishes that ore moving from the Empire Mine over the Ore Division is handled under a long-term contract between CCI and UP that does not expire until April 1999. This arrangement is long-standing. With SSMB's acquisition of the UP lines the transportation will continue under the same, or possibly better, arrangements. The steel plants in East Chicago are configured to receive taconite by boat. Plant facilities to receive all-rail unit train movements do not exist. Inland Steel and LTV thus have not shown that they will be under the imminent threat of irreparable harm in the absence of a stay.

The public interest does not support the issuance of a stay in these circumstances. SSMB has garnered significant support for this transaction, as evidenced by numerous letters submitted by major corporations, local governments, and individuals attesting to its benefits. Notice of Exemption, Exhibit B. It appears that the public interest would best be served by allowing the transaction to proceed and become effective. The issues raised by Inland Steel and LTV may then be resolved in the context of their petitions to reject and revoke.

Further, although protestants have asserted that a stay in these circumstances "should not cause undue hardship" to other parties, the protestants provide no support for this assertion. By contrast, SSMB states that it will lose up to \$300,000 in revenues for each day that closing is delayed.

Finally, protestants have not shown, on the present record, a clear likelihood that they will prevail on the merits of their argument. In particular, SSMB and UP have presented evidence raising significant doubt as to whether the WCL all-rail route provides a competitive alternative to joint rail/water movements through Escanaba. E.g., SSMB reply at 14-22. On the other hand, the carriers point out that, contrary to protestants' arguments here, the steel companies have previously indicated their belief that the LS&I - Marquette Dock route remains an effective rail alternative. Id. at 22-23, V.S. Schauer. These arguments raise questions about whether the transaction will reduce at all the protestants' present transportation alternatives.

Accordingly, we find that protestants have failed to satisfy the Holiday Tours' criteria, and that their arguments cannot serve as a reason to stay this proceeding. Instead, those arguments are more properly addressed in the context of protestants' petition to reject and revoke the exemption, where they can and will be explored in full.

Finally, Inland Steel and LTV have filed a discovery request. Under 49 CFR 1121.2, discovery must be filed with the petition to revoke and completed 30 days from that date. The party seeking discovery may supplement its petition to revoke 45 days after its petition is filed. Replies to the supplemental petition are due 15 days after the supplemental petition is

filed. Therefore, we will allow the protestants to supplement their petitions to revoke and reject. SSMB and UP may reply to these supplemental filings. A procedural schedule is set out in the ordering paragraphs.

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 is denied.
2. Inland Steel and LTV's supplemental petition is due February 20, 1997.
3. SSMB's/UP's reply is due on March 7, 1997.
4. This decision is effective on the service date.

By the Board, Linda J. Morgan, Chairman,

Vernon A. Williams
Secretary