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SERVICE DATE - LATE RELEASE JUNE 22, 2004

## SURFACE TRANSPORTATION BOARD

### DECISION

STB Docket No. AB-308 (Sub-No. 3X)

### CENTRAL MICHIGAN RAILWAY COMPANY– ABANDONMENT EXEMPTION–IN SAGINAW COUNTY, MI

Decided: June 22, 2004

### BACKGROUND

In a decision that was served on October 31, 2003, the Board granted an exemption to the Central Michigan Railway Company (CMR) under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903, thereby permitting CMR to abandon approximately 1.77 miles of railroad, extending from milepost 2.83 at the western end of CMR's railroad bridge over Interstate Highway 75 to milepost 4.60, in Saginaw County, MI.

In the decision, the Board noted that this was not the typical abandonment proceeding where a carrier claims that alleged losses attributable to operating the rail line justify the abandonment. Rather, the principal reason for granting CMR's abandonment request was to facilitate plans by the Michigan Department of Transportation (MDOT) to widen Interstate Highway 75. The only active shipper on the line, Plastatech Engineering Ltd. (Plastatech), a manufacturer of vinyl roofing laminates, had objected to the abandonment.

In a decision served on September 25, 2003, the Board noted that CMR had offered to provide transloading service to Plastatech for PVC resins and had offered to continue storing PVC shipper cars on its line without car hire charges so that Plastatech could continue to receive PVC in carload volumes. CMR had also offered Plastatech a rate reduction in conjunction with the transload operation to offset costs of the trucking portion of the transload operation. Because this appeared to be a situation where private resolution would benefit both the carrier and the shipper, the Board directed the parties to undertake negotiations to attempt to reach an agreement and to advise the Board of the results of the negotiations by October 16, 2003. However, on that date, the parties advised the Board that they were not able to reach an agreement.

In the October 31, 2003 decision granting the exemption, the Board reiterated that CMR had offered to: (1) provide a \$200 per car rebate on future rail freight charges for Plastatech shipments transloaded at CMR's facility in Saginaw, MI; (2) continue open-ended holding of

loaded private cars consigned to Plastatech without added charge; and (3) make a cash payment to Plastatech sufficient to cover the book value (less salvage value) of the rail facilities in which Plastatech recently had invested to switch from truck to direct rail service for receiving PVC resin. In granting the exemption, the Board held CMR to its offer and imposed conditions requiring that CMR provide alternative transload service to Plastatech under the terms proposed and compensate Plastatech in the amount of \$100,710 (less salvage value) for the shipper's recent investment in facilities to receive direct rail shipments from CMR.

On December 15, 2003, Plastatech filed a petition asking the Board to clarify the \$200 per car rebate condition. According to Plastatech, CMR had originally offered the \$200 per car rebate for all future rail shipments handled in the transload operation, but the agreement that CMR prepared to implement the conditions in the Board's decision limited the \$200 per car rebate to a time period of 3 years. Plastatech objected to the time limit, contending that CMR's original offer to pay the rebate was open-ended. The shipper asserts that CMR subsequently responded that it would not enter into an agreement for a period longer than 5 years. In its petition, Plastatech asks that the Board clarify whether the rebate condition imposed in the October 31, 2003 decision is open-ended.

CMR responded on December 18, 2003, that the relief requested by Plastatech is unreasonable, impractical, and inconsistent with the intent of its original offer, which was reported to the Board on October 16, 2003. CMR states that its original offer was part of the private negotiations between the parties that had been directed by the Board. According to CMR, during those discussions, it initially offered to limit the \$200 per car rebate to a 3-year term, but was prepared to offer a 5-year term if Plastatech would commit to a minimum number of cars per year. CMR states that it has even offered to extend the rebate to a full 5 years without any corresponding minimum volume commitment by Plastatech. CMR indicates that it did not offer to provide the \$200 rebate forever without qualification. The carrier states that it intended that the words "all future" would be limited to the context of the rail contract that it was negotiating with Plastatech.

CMR states further that requiring it to abide by an open-ended commitment without a guarantee of any minimum number of cars would be unreasonable and inconsistent with rail industry practice. According to CMR, most rail industry transportation contracts expire in 1 year, and most pricing arrangements under which Plastatech's PVC is presently shipped expire in less than 2 years. CMR states that these arrangements were established by the origin carriers, and that it participates in and receives a division of those rates, but it does not set the rates.

CMR indicates that it has agreed to sell most of its assets, including the line that serves Plastatech, to the Huron & Eastern Railway Company (HESR).<sup>1</sup> Apparently, HESR has agreed to assume CMR's contracts and obligations to Plastatech. CMR claims that HESR would be unfairly burdened if required in perpetuity to offer a \$200 per car rebate on the traffic at issue.

In a letter dated January 6, 2004, Plastatech disputes CMR's assertion that the railroad offered a 3-year term for future transload shipments in discussions leading up to the October 16 report. Plastatech contends that the first time the 3-year term was offered was in CMR's proposed contract that was submitted to the shipper in December 2003. By letter dated January 12, 2004, CMR responds that William Salter, CMR's Vice President, recalled discussions with Plastatech prior to October 16 in which he indicated that the time frame for the \$200 per car rebate must be limited. Plastatech has submitted a letter dated January 16, 2004, that contains a verified statement from James Chrysler of Plastatech stating that he represented Plastatech in the pre-October 16 negotiations, and that Mr. Salter did not indicate that the time frame for the per car rebate would be limited.

By letter dated February 3, 2004, CMR has advised the Board that, on December 15, 2003, the abandonment was consummated, the property was transferred to MDOT, and transload service was established for Plastatech. MDOT, thus, can go forward with plans to widen Interstate Highway 75. Also, CMR has advised that the transload service was transferred to HESR as a result of HESR's purchase of CMR's remaining assets.

#### DISCUSSION AND CONCLUSIONS

When the Board imposed the conditions for the transload operation in the exemption decision, it expected that the parties would reach an agreement on implementing the conditions for the transload operation. Unfortunately, the parties have been unable to agree whether the offer of the \$200 per car rebate would be subject to a time limit. To assist the parties in completing the agreement for the transload operation, the Board will grant the petition to clarify.

CMR's proposal containing a time limit for paying rebates to Plastatech appears to be consistent with industry practice. CMR points out that rate agreements uniformly have time limits and are not open-ended, because the carrier must be able to take actions to adjust to changes in the marketplace within a reasonable period of time. Consistent with that notion, in deciding several recent rate reasonableness complaints, the Board has found that a certain condition imposed in a merger proceeding was not, and could not have been, meant to freeze existing rates indefinitely, thereby depriving the merging carriers of the ability to adjust their

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<sup>1</sup> See Huron & Eastern Railway Company, Inc.—Acquisition and Operation Exemption—Central Michigan Railway Company, STB Finance Docket No. 34438 (STB served Feb. 4, 2004).

rates to react to changing market conditions. See Duke Energy Corp. v. Norfolk S. Ry., STB Docket No. 42069, slip op. at 9 (STB served Nov. 6, 2003); Carolina Power & Light Co. v. Norfolk S. Ry., STB Docket No. 42072, slip op. at 10 (STB served Dec. 23, 2003); and Duke Energy Corp. v. CSX Transp., Inc., STB Docket No. 42070, slip op. at 9-10 (STB served Feb. 3, 2004). These precedents dictate against an open-ended rebate condition because the carrier would never be able to adjust the arrangement to meet changing economic circumstances.

As to what would constitute a reasonable term for the rebate to remain in effect, the agency has imposed conditions in several rail merger proceedings that have been limited to 5-year terms. See, e.g., Guilford Transportation-Control-B&M, et al., 5 I.C.C.2d 202, 228-29 (1988) (interchange condition imposed for 5-year term); CSX Corp. et al.-Control-Conrail Inc. et al., 3 S.T.B. 196, 255-56 (1998) (reciprocal switching condition imposed limiting certain charges to \$250 per car, subject to an inflation adjustment, for a 5-year period). In doing so, the agency considered that length of time to be an ample period for those affected to adjust to the competitive situation brought about by the transaction. And in CSX Corp., et al.-Control-Conrail, Inc., et al., 3 S.T.B. 764, 772 (1998), the Board rejected a request for permanent relief by certain shippers of aggregates regarding the preservation of single-line service and, instead, limited the condition it imposed to a 5-year term. The Board reasoned, in part, that permanent relief would be contrary to the public interest, because such relief would unduly interfere with carrier operations, and would impair carrier operating flexibility, which is essential to efficient, economical operations from which all shippers benefit. Consistent with these precedents and the offers made by CMR, a 5-year time limit at the outset, in the Board's view, would accord Plastatech with sufficient time to adjust to the transload arrangement in this unusual case, while not locking the carrier into a permanent or unreasonably long rate arrangement. At the end of the 5-year period, Plastatech may request that the Board extend the duration of the rebate for a period of up to an additional 5 years if circumstances so warrant.

In sum, the Board clarifies that the \$200 per car rebate should not be required in perpetuity and that a 5-year time limit appears reasonable at the outset. Furthermore, the Board expects the parties to negotiate in good faith, consistent with the guidance set forth in this decision, and complete any further agreements necessary to implement the conditions that were imposed for the transload operation. If the parties are unable to reach a final agreement through negotiations, the Board's arbitration procedures at 49 CFR part 1108 are also available as a means to enable them to resolve this matter.

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

It is ordered:

1. Plastatech's motion to clarify is granted to the extent set forth in this decision.

2. This decision is effective on June 22, 2004.

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

Vernon A. Williams  
Secretary