

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35019

WESTERN NEW YORK & 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

Decided: August 6, 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). 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).

On June 26, 2007, the Board issued a decision in this proceeding that: (1) denied a request by WNYP for waiver of the requirement at 49 CFR 1150.42(e) that employees to be affected by this transaction receive notice of the transaction; (2) denied a request for stay filed by Samuel J. Nasca, for and on behalf of the United Transportation Union-New York State Legislative Board (UTU-NY) of the effective date of the exemption in this proceeding; and (3) denied UTU-NY's petition to reject WNYP's notice of exemption. In that decision, we stated that the exemption was due to become effective on August 3, 2007.

On June 26, 2007, UTU-NY filed a motion to compel discovery of the underlying lease and operation agreement between WNYP and NSR (agreement). The motion to compel was granted by decision served on July 16, 2007. Per a motion filed by WNYP on July 17, 2007, a protective order was issued in this proceeding on July 26, 2007.

On August 2, 2007, UTU-NY filed a petition for a stay of the effectiveness of the notice of exemption. UTU-NY argues that a stay is necessary to afford the requisite 60 days' notice to employees based in Buffalo, NY, based on alleged announcements made by the carriers on August 1 and 2 that NSR will no longer operate or provide service on the line from Buffalo to Machias (which is part of the line over which NSR has been providing service between Buffalo and Renovo, PA). According to UTU-NY, these Buffalo-based NSR employees were notified in STB Finance Docket No. 35044, Buffalo & Pittsburgh Railroad, Inc.—Lease and Operation

Exemption—Norfolk Southern Railway Company (BPRR transaction), that NSR would no longer provide this service. UTU-NY argues, however, that WNYP's exercise of its exemption authorization would deprive those individuals subject to the BPRR notice of their 60 days' notice period evidently because of a statement UTU-NY attributes to NSR that NSR would carry out certain operational changes affecting those individuals less than 60 days after notice was given in the BPRR transaction.

On August 3, 2007, WNYP replied in opposition to the August 2 stay request. WNYP reports that it has consummated the lease transaction with NSR and that the stay request is moot. WNYP goes on to say that, in its view, the stay request has no merit, maintaining that it gave notice to all employees affected by its lease of the NSR line between Machias Junction and Driftwood and that those employees were notified that NSR would no longer be operating through service between Buffalo and Renovo.

As we observed in our June 26 decision, in denying an earlier request for stay filed by UTU-NY, 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) (Holiday Tours); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, "it is the movant's obligation to justify the . . . exercise of such an extraordinary remedy." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay carry 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).

The latest UTU-NY request for stay will be denied. Despite our prior reminder, UTU-NY's motion does not even recite Holiday Tours criteria, much less offer any evidence or argument to show that its stay request meets them. UTU-NY has failed to demonstrate irreparable harm to affected employees absent a stay of the effectiveness of the exemption authorizing the lease and operation by WNYP. Any NSR employees adversely affected by the BPRR transaction will be subject to the standard labor protective conditions imposed in that proceeding. Employees may attempt to show that those protections are insufficient to address the harm but UTU-NY has not made such a showing on this record. We note also that UTU-NY may, if it wishes, seek relief by filing a petition for revocation of the exemption in this proceeding. To the extent that UTU-NY purports to show that NSR plans to prematurely stop providing service over the line it proposes to lease to BPRR in the BPRR transaction, we remind NSR that it retains the common carrier obligation to provide that service unless and until the BPRR transaction is authorized.

Also, on July 25, 2007, UTU-NY filed a petition asking the Board to remove this proceeding from the Director of the Office of Proceedings for disposition by the Board or a Member of the Board (July 25 petition). UTU-NY asserts that the Director did not take timely action to permit UTU-NY access to the agreements underlying the noticed transaction. UTU-NY

also complains about the time it took for the Board to rule on its motion to compel and suggests that the Board extend, on its own motion, the effective date of the exemption in this proceeding. WNYP replied in opposition to UTU-NY's suggested extension of the exemption's effective date on July 26, 2007. We will also deny UTU-NY's request made in the July 25 petition.

As stated above, a protective order was issued in this proceeding in a decision served on July 26, 2007. Accordingly, the issues of alternative handling of the motion for protective order and of access to the underlying agreements that were raised in the July 25 petition are moot. If UTU-NY suffered any harm from what it asserted on July 25 was a delay in its receipt from WNYP of confidential information, it made no mention of it in its August 2 request for stay.

Regarding the motion to compel, UTU-NY states that the Board took 20 days to rule on an unopposed motion to compel. Although, as it turned out, the Board did not receive any opposition to that motion, the processing of the motion was reasonable in light of a letter from WNYP, as noted in the July 16, 2007 decision, stating WNYP's intention to file a response to UTU-NY's motion to compel within the time allotted to WNYP under 49 CFR 1104.13(a) (i.e., within 20 days after the date the motion to compel was filed with the Board). In any event, the Board did not wait for that WNYP response before granting UTU-NY's motion to compel.

Finally, to the extent that the July 25 petition seeks different relief from that sought in its August 2 stay request, we find no basis for adopting UTU-NY's suggestion that the effective date of the exemption be extended in this proceeding.

It is ordered:

1. UTU-NY's August 2 petition for stay is denied.
2. UTU-NY's July 25 petition is denied.
3. This decision is effective on its service date.

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

Vernon A. Williams  
Secretary