

33301
CO

SERVICE DATE – DECEMBER 26, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34255

PORTLAND & WESTERN RAILROAD, INC.–LEASE AND OPERATION EXEMPTION–
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

STB Finance Docket No. 34304

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY–TRackage
RIGHTS EXEMPTION–THE PORTLAND & WESTERN RAILROAD, INC.¹

Decided: December 24, 2002

On November 21, 2002, in STB Finance Docket No. 34255, Portland & Western Railroad, Inc. (P&WR), a Class III carrier, filed a notice of its intent to file an exemption notice pursuant to 49 CFR 1150.41, to exempt from regulation under 49 U.S.C. 10902 its lease and operation of an approximately 76.75-mile line of railroad currently owned and operated by The Burlington Northern and Santa Fe Railway Company (BNSF), from milepost 64.70 located between Quinaby and Salem, OR, to the End of Track at milepost 141.45 near Eugene, OR.

On December 6, 2002, P&WR filed its notice of exemption. Originally, as part of the transaction, P&WR stated that it intended to grant what it calls “incidental” overhead trackage rights to BNSF over the rail line between Bush (milepost 68.6) and Albany (milepost 96.5), and to Central Oregon & Pacific Railroad, Inc. (CORP), between Albany (milepost 96.5) and Eugene (milepost 141.5). However, by letter filed on December 23, 2002, P&WR withdrew its request to grant trackage rights to CORP. On December 20, 2002, BNSF, in STB Finance Docket No. 34304, separately filed a verified notice of exemption to exempt from regulation its relevant trackage rights. On December 23, 2002, BNSF filed a motion to dismiss that exemption, arguing that separate Board approval is not required.

Also on December 23, 2002, John D. Fitzgerald, on behalf of the United Transportation Union-General Committee of Adjustment (UTU/GO-386), filed a petition for stay of both exemptions based on allegations of false or misleading information, violations of employee notice provisions, the

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

need for effective labor negotiations, receipt of defective discovery materials, a lack of an adequate opportunity to fully address the issues, and the need for an opportunity to submit a petition to reject the notices and/or revoke the exemptions. It argues that in reality the transactions represent a “joint use” arrangement under the statutory provisions of 49 U.S.C. 11323, with corresponding labor protective benefits. In addition, UTU/GO-386 seeks an unredacted copy of the lease agreement.²

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 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., 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 Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

UTU/GO-386 has not shown that it is likely to prevail in its argument that railroad employees would suffer irreparable injury in the absence of a stay. In the event that it were later to be found that the transaction is subject to 49 U.S.C. 11323 governing joint use and that, consequently, affected employees would be entitled to corresponding labor protective benefits, the compensation and benefits would relate back to any harm suffered by employees at the beginning of the transaction. Thus, it cannot be said that affected employees would suffer irreparable harm.

Moreover, UTU/GO-386 has not shown that it is likely to prevail on the merits of its argument that a “joint use” arrangement is involved. This contention is mere conjecture, as UTU/GO-386 has not come forward with sufficient evidence and argument necessary to convince the Board that it is likely to prevail in its argument that this is “joint use.”

Accordingly, the stay request will be denied. The record does not support issuance of a stay. UTU/GO-386 has not shown that there is a strong likelihood that it will prevail on the merits or that its members will suffer irreparable harm under the applicable stay criteria.

² An unredacted copy of the lease agreement should be turned over to petitioner’s representative in accordance with the Board decision served on December 16, 2002.

This decision 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. This decision is effective on its service date.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary