

236108

BEFORE THE
SURFACE TRANSPORTATION BOARD
STB DOCKET NO. FD 35799

ENTERED
Office of Proceedings
May 28, 2014
Part of
Public Record

RAPID CITY, PIERRE & EASTERN RAILROAD, INC.
-- ACQUISITION AND OPERATION EXEMPTION
INCLUDING INTERCHANGE COMMITMENT --
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

REPLY OF RAPID CITY, PIERRE & EASTERN RAILROAD, INC.
TO MOTION OF UNIONS FOR LEAVE TO FILE REPLY TO REPLY

ERIC M. HOCKY
CLARK HILL PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: May 28, 2014

Attorneys for
Rapid City, Pierre & Eastern Railroad, Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD
STB DOCKET NO. FD 35799

RAPID CITY, PIERRE & EASTERN RAILROAD, INC.
-- ACQUISITION AND OPERATION EXEMPTION
INCLUDING INTERCHANGE COMMITMENT --
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

REPLY OF RAPID CITY, PIERRE & EASTERN RAILROAD, INC.
TO MOTION OF UNIONS FOR LEAVE TO FILE REPLY TO REPLY

Rapid City, Pierre & Eastern Railroad, Inc. ("RCP&E") hereby submits this Reply to the Motion submitted by the Brotherhood of Maintenance of Way Employees Division / IBT, Brotherhood of Railroad Signalmen, and International Association of Sheet Metal, Air, Rail and Transportation Workers/Mechanical Division (the "Unions") for leave to file a reply to a reply ("Motion for Leave"). Although the Unions have filed a motion to allow the filing of the reply, they have not specifically acknowledged that a "reply to a reply" is not permitted under the Board's rules. 49 CFR §1104.13(c). For the reasons set forth herein, the Motion for Leave should be denied.¹

Background

In this proceeding, on March 11, 2014, RCP&E filed a notice of exemption to acquire from Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") approximately 670 miles of

¹ The Unions also filed their proposed reply to reply (which they entitle "Reply in Support of Petition for Revocation of Exemption"). International Association of Machinists & Aerospace Workers District Lodge 19 ("IAM"), and International Association of Sheet Metal, Air, Rail and Transportation Workers/Transportation Division ("SMART – Transportation") separately filed joinders to the Reply in Support which would only be relevant if the Motion for Leave were granted by the Board. *See* IAM Joinder at 1, fn 1. RCP&E is herein only responding to the Unions' Motion for Leave. If the Motion for Leave were to be granted by the Board, then RCP&E requests that it be given ten days to file a Sur-Reply to the Reply in Support and the Joinders, in keeping with the general structure of the Board's rules that a party can file a reply to any [permitted] pleading. *See* 49 CFR §1104.13(a).

rail lines in South Dakota, Wyoming, Minnesota and Nebraska (the “DM&E West Lines”). The Board issued a notice of the exemption on March 27, 2014. As noted in the Board’s notice, absent a stay, the exemption would become effective on April 25, 2014, 45 days after the filing of the notice of exemption. No objections were filed, including by the Unions or the other labor interests. Nor did the Unions or other labor interests ask for any conditions. No requests for stay were filed by the April 11, 2014 deadline set forth in the Board’s notice. Because no stay was requested or issued, the exemption became effective on April 25, 2014.

On Friday, April 18, 2014, just one week before the exemption was scheduled to become effective the Unions filed a petition to revoke RCP&E’s exemption (the “Petition to Revoke”) claiming that labor protection should be imposed on the acquisition despite the clear provisions of 49 USC §10901 prohibiting the imposition of labor protection on an acquisition by a non-carrier.² RCP&E timely filed a Reply to the Petition to Revoke on May 7, 2014, setting forth why the Petition to Revoke should be denied.

The Unions have now has filed a Motion for Leave seeking permission from the Board to file a reply to the Reply of RCP&E. For the reasons set forth herein, the Unions’ Motion for Leave should be denied.

Discussion

The Unions have labeled their proposed filing as a “Reply in Support of Petition for Revocation” perhaps to avoid the Board’s regulation that specifically provides that a “reply to a reply is not permitted.” 49 CFR §1104.13(c). However, the Unions acknowledge that proposed reply is “in response to the reply filed by RCP&E in opposition to the Unions’ petition.” See Motion for Leave at 1. The Board’s regulations are meant to control its docket, and to establish

² Similar petitions were filed by IAM, and by SMART – Transportation.

an end to filings so that a decision can be issued. *Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine (“Waterloo Railway”)*, STB Docket No. AB-124 (Sub-No. 2) (served May 6, 2003), slip op. at 3 (“the pleading process ends with the reply, and replies to replies are not permitted”). While the Board can allow additional replies and sur-replies, when it is necessary, for “good cause” or when additional information is necessary to provide a complete factual record, *id.*, the reasons given in the Union’s Motion for Leave meet none of these criteria. The arguments proposed in the Reply to Reply, add nothing to the record – but merely request leave to rehash, reframe and reargue the same arguments made in the Petition to Revoke. More importantly, the Unions have not suggested any new facts, or that the factual record is not complete. See *Peter Pan Bus Lines, Inc. – Pooling – Greyhound Lines, Inc.*, STB Docket Nos. MC-F-20904, *et al* (served April 20, 2011), slip op. at 3 (record not incomplete based on representations / alleged misstatements in other party’s reply; repetition of same arguments made in Petition rejected). See also *Waterloo Railway, supra*.

The Unions do not provide any basis to support the granting of their Motion for Leave.³ All of the reasons given suggest that the Unions want merely to clarify their initial arguments and reargue the same arguments that they already made, and to make additional legal arguments in response to the RCP&E Reply. The Unions do not adequately explain why they did not or could not have included their arguments in their Petition to Revoke. For example, despite the

³ The real reason may be that the Unions want to delay a Board decision on their Petition to Revoke in the hope that it will delay or interfere with the closing of the proposed acquisition. Motion for Leave at 2 (improperly claiming that RCP&E requested that the Board issue its decision before the closing). RCP&E asked only that the Board act expeditiously to avoid ongoing uncertainty. RCP&E Reply at 4-5. However, RCP&E made clear that no stay was requested or issued, that its exemption is effective, and that it can close at any time. RCP&E Reply at 6-7.

fact that the Unions are seeking to revoke RCP&E's notice of exemption which was filed under 49 USC §10901 and the Board's regulations under 49 CFR §1150.31 *et seq.* (governing exempt transactions under 49 USC §10901), the Unions say that they could not have anticipated that RCP&E would argue that the provisions of Section 10901(c) specifically preclude the imposition of labor protection on acquisitions by a non-carrier.⁴ Additionally, the Unions are merely seeking (1) the opportunity to respond to what they claim are "mischaracterizations" of the arguments previously made that RCP&E and its parent Genesee & Wyoming Inc. ("GWI") and its other subsidiary railroads should be treated as joint acquiring carriers despite not showing that they are alter egos or that RCP&E is a sham, (2) to reargue the meaning of statements of GWI and its officers that the Unions previously placed in the record, and (3) to "help" the Board by a further response to RCP&E's argument that the "two step" acquisition process under which RCP&E and GWI have obtained their exemptions, which process has been approved by the Board on numerous occasions and was appropriately used in this proceeding, despite the fact that the Unions have dedicated significant portions of their Petition to Revoke on this subject. Thus, the Unions do not seek to supplement the factual record, nor have they indicated why they could not have made these arguments previously, or why they need to rehash the arguments they made previously.

⁴ Moreover, the Unions in their Petition to Revoke discuss Section 10901 and its history throughout the Petition to Revoke. *See, e.g.*, Unions' Petition to Revoke at 21-25.

Conclusion

Because the proposed reply to reply is merely a rehash of legal arguments that were or could have been presented in the Petition to Revoke, and proposes nothing to create a more complete record, the Unions' Motion for Leave should be denied, and its proposed Reply to Supplement Record should not be admitted into the record.

Respectfully submitted,



ERIC M. HOCKY
CLARK HILL PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: May 28, 2014

Attorneys for
Rapid City, Pierre & Eastern Railroad, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on the following by U.S. first class mail, postage pre-paid:

Terence M. Hynes
Sidley Austin LLP
1501 K Street, NW
Washington DC 20005

Hon. John Thune
United States Senate
511 Dirksen Senate Office Building
Washington, DC 20510

Hon. Dennis Daugard
Office of the Governor
500 E Capitol Ave
Pierre, SD 57501

Hon. Tim Johnson
United States Senate
136 Hart Senate Office Building
Washington, DC 20510

Darin Bergquist, Secretary
South Dakota Department of Transportation
Becker-Hansen Building
700 East Broadway Avenue
Pierre, SD 57501-2586

Hon. Kristi Noem
United States Congress
1323 Longworth House Office Building
Washington, DC 20515

Hon. Dave Heineman
Office of the Governor
P.O. Box 94848
Lincoln, NE 68509-4848

Nebraska Department of Roads
Attention: Rail & Public Transportation
Division
PO Box 94759
1500 Nebraska Highway 2
Lincoln, NE 68509-4759

Hon. Mark Dayton
Office of the Governor
130 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Tom Sorel, Commissioner
Minnesota Department of Transportation
Transportation Building, MS-100
395 John Ireland Boulevard
St. Paul, MN 55155-1899

Hon. Matt Mead
Office of the Governor
State Capitol
200 West 24th Street
Cheyenne, WY 82002-0010

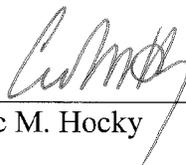
John Cox, Director
Wyoming Department of Transportation
5300 Bishop Boulevard
Cheyenne, WY 82009-3340

Erika A. Diehl-Gibbons
Assistant General Counsel
SMART – Transportation Division
(formerly United Transportation Union)
24950 Country Club Blvd., Ste. 340
North Olmsted, OH 44070-5333

Hon. Fred W. Romkema
State Capitol
500 East Capitol Ave.
Pierre, SD 57501

Joseph Guerrieri, Jr.
Carmen Parcelli
Guerrieri, Clayman, Bartos & Parcelli, PC
1900 M. Street, NW
Suite 700
Washington, DC 20036

Richard S. Edelman
O'Donnell, Schwartz and Anderson, P.C.
1300 L Street, N.W.
Suite 1200
Washington, DC 20005



Eric M. Hocky

Dated: May 28, 2014