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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-1075X

MANUFACTURERS RAILWAY COMPANY
- DISCONTINUANCE EXEMPTION -
IN ST. LOUIS, MO

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MOTION TO STRIKE

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August 5, 2011

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Manufacturers Railway Company (“MRS”) respectfully moves to strike the late-filed proposed replies of BMWED, UTU and “IAM”¹ to MRS’s petition to stay. Under the Board’s regulations (and as noted by the BMWED, IAM, and UTU motions), replies to petitions to stay pending judicial review “must reach the Board no later than five days after the petition is filed.” 49 C.F.R. § 1152.25(e)(7)(iii). The three replies were filed 9 days after the MRS stay petition was filed: the IAM Reply was filed after the 5 pm deadline on August 4, and the UTU and BMWED replies were emailed to counsel for MRS on the afternoon of August 5. No party filed a timely request to extend the deadline or contacted counsel for MRS about extending the deadline. The three replies should be stricken as untimely.

UTU provides no reason or excuse for the delay, and its proposed response should therefore be stricken as untimely. The excuse for late filing asserted by IAM, that counsel was attending a conference on the day the response was due, is not good cause for late filing. Since documents can be electronically filed with the Board from anywhere in the world on any day of

¹ The filing is ostensibly on behalf of the International Association of Machinists and Aerospace Workers (IAM), which was a party to the proceeding, but the concluding paragraph states that the “BLET” (the Brotherhood of Locomotive Engineers and Trainmen) is the party requesting that the stay be denied. In case the reference to BLET was not a typographical error, MRS notes that BLET was not a party to this proceeding and is not entitled to file a reply to MRS’s stay petition.

the week, counsel could have filed its reply before it left for the conference, from the conference itself, or could have had another attorney in its office file the reply on the day it was due.

Likewise, BMWED states that its counsel was out of town on the day it received the service copy of the filing and provides various scheduling excuses for why it could not respond in a timely fashion under the Board's rules. BMWED does not explain, however, why it failed to check the Board's website on the deadline for petitions to stay (since the MRS pleading was posted there by 5pm) or why it failed to move for an extension prior to the deadline. The Board has short timelines for motions to stay and replies in these proceedings for a reason, and given the emergency nature of MRS's stay request, the late-filed replies should be stricken.

In addition, IAM's reply and portions of BMWED's reply should be stricken pursuant to 49 C.F.R. § 1104.8, as they contain "redundant, irrelevant, immaterial, impertinent, or scandalous matter" and materially misrepresents the record.² IAM and BMWED materially misrepresent what MRS said in its petition; thus, the replies contain impertinent and scandalous matter. Specifically, IAM and BMWED assert that MRS "baldly states that . . . [it] has no intention to pay them the protection," IAM Reply at 2, that "the Carrier has no intention of actually paying the statutorily mandated employee protections," BMWED Reply at 12-13, that "MRS baldly states that it will simply refuse to comply with the Act" in the absence of a successful appeal, BMWED Reply at 13, and that MRS's petition contains "openly stated disdain for the requirements of the Act," *id.*

These assertions are simply false. MRS will of course comply with its legal obligations to the extent it is able to do so. The problem, as MRS noted in its petition, is not that MRS has

² The Board's regulations do not permit a reply to a reply, and MRS is therefore not responding to the legal arguments made in the three filings. MRS notes, however, that those arguments, regardless of their merits, generally were not asserted in the Decision, and therefore are irrelevant to whether the Decision will be upheld on appeal, or MRS's likelihood of success on the merits.

no intention to pay the labor protective conditions, but that it has no legal obligation to do so without shipper revenues with which to fund those conditions. Petition to Stay at 9-10, 18-19. The precedent in this regard is clear, and neither IAM nor BMWED make any attempt to distinguish it.

BMWED states that “one of the world's largest corporations seeks to stay the STB’s decision.” BMWED Reply at 2. This is simply false. MRS, which provided rail service over a few miles of track for a handful of shippers, is not a large corporation; it is simply a Class III railroad. Nor would MRS, once it discontinues its common carrier service, “remain able to continue to serve its corporate parent.” *Id.* These statements are erroneous, scandalous, and impertinent, and should be stricken.

IAM irrelevantly suggests that because MRS “offers no evidence whatsoever that it is not holding funds that would enable it to satisfy a protection obligation,” IAM Reply at 2, it should be made to use whatever funds it has at its disposal to pay. Even if such funds existed, the law has never required a carrier abandoning or discontinuing service over its entire system to pay labor protective conditions out of its cash reserves, to use the proceeds from salvage operations, or to liquidate other assets in order to pay labor protective conditions.³ Labor protective conditions imposed in abandonment and discontinuance proceedings are not and were not intended to be a simple wealth transfer from a carrier to its employees that must be paid ahead of a carrier’s other obligations, and IAM cites no authority for that proposition.

Finally, IAM provides no basis for its impertinent and scandalous implication that MRS does not intend to comply with the terms of the collective bargaining agreements it has with its

³ The situation would be different if there were some benefit to MRS’s corporate parent “over and above the relief from the burden of deficit operations” but IAM has not alleged, the record contains no evidence, and it simply is not true that that is the case here.

employees. Those agreements will continue to apply until they are terminated pursuant to their terms, and are not affected in any way by MRS's appeal.

CONCLUSION

The replies by BMWED, UTU, IAM to MRS's petition to stay should be struck from the record, as it is impermissibly late under the Board's rules and contains nothing but redundant, irrelevant, immaterial, impertinent, or scandalous matter.

Respectfully submitted,

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August 5, 2011

CERTIFICATE OF SERVICE

I certify that I have this 5th day of August, 2011, served copies of the foregoing Motion to Strike upon the following parties of record in this proceeding by first-class mail and email.

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