

LAW OFFICES OF
LOUIS E. GITOMER

LOUIS E. GITOMER
LOU_GITOMER@VERIZON.NET

THE ADAMS BUILDING, SUITE 301
600 BALTIMORE AVENUE
TOWSON, MARYLAND 21204-4022
(202) 466-6532
FAX (410) 332-0885

January 9, 2009

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

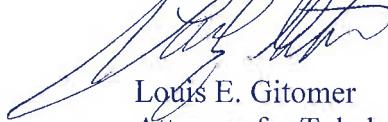
RE: Finance Docket No. 35205, *U S Rail Corporation—Lease and
Operation Exemption—Winamac Southern Railway Company and
Kokomo Grain Co., Inc.*

Dear Acting Secretary Quinlan:

Enclosed for e-filing is a Petition for Stay of the Notice of Exemption filed in the
above-entitled proceeding by U S Rail Corporation. Thank you for your assistance.

If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer
Attorney for Toledo, Peoria & Western Railway
Corporation

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35205

U S RAIL CORPORATION-LEASE AND OPERATION EXEMPTION-
WINAMAC SOUTHERN RAILWAY COMPANY AND KOKOMO GRAIN CO., INC.

PETITION FOR STAY

Scott G. Williams Esq.
Senior Vice President & General Counsel
RailAmerica, Inc.
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256
(904) 538-6329

Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer
600 Baltimore Avenue
Suite 301
Towson, MD 21204
(202) 466-6532
Lou_Gitomer@verizon.net

Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: January 9, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35205

U S RAIL CORPORATION—LEASE AND OPERATION EXEMPTION—
WINAMAC SOUTHERN RAILWAY COMPANY AND KOKOMO GRAIN CO., INC.

PETITION FOR STAY

The Toledo, Peoria and Western Railway Corporation (“TP&W”) respectfully petitions the Surface Transportation Board (the “Board”) to stay the effectiveness of the Verified Notice of Exemption (the “Notice”) filed in this proceeding on December 11, 2008 by U S Rail Corporation (“US Rail”) under 49 C.F.R. §1150.41, with respect to the 3.0 miles of incidental trackage rights over track owned by TP&W, between milepost 71.5 at Van Jct. (Logansport) and milepost 74.5 at Eighteenth St. Yard (Logansport). There is no longer a trackage rights agreement to be assigned to US Rail.

TP&W will demonstrate that that there is a strong likelihood that it will prevail on the merits, will suffer irreparable harm in the absence of a stay, that other interested parties will not be substantially harmed, and that the public interest supports the granting of the stay.

STAY CRITERIA

The Board has recently said that:

In deciding petitions for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to 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); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries 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).

Grand Elk Railroad, L.L.C. – Lease and Operation Exemption – Norfolk Southern Railway Company, STB Finance Docket No. 35187 (STB served December 22, 2008). TP&W will demonstrate that the stay criteria have been met in this situation.

BACKGROUND

US Rail filed the Notice on December 5, 2008, as corrected December 11, 2008, and further amended on January 6, 2009. The Board served a notice on December 31, 2008. *US Rail Corporation – Lease and Operation Exemption – Winamac Southern Railway Company and Kokomo Grain Co., Inc.*, STB Finance Docket No. 35205 (STB served December 31, 2008) (the “STB Notice”). The Notice is scheduled to become effective on January 16, 2009. See the *STB Notice* at 2. In the Notice, US Rail seeks to lease and operate 58.89 miles of railroad from Winamac Southern Railway Company (“WSRY”) and Kokomo Grain Co., Inc. (the “Line”) and to be assigned incidental trackage rights over 3.0 miles of TP&W between milepost 71.5 at Van Jct. and milepost 74.5 at Eighteenth St. Yard (the “TPW Line”).

TP&W objects to the operation over the TPW Line under the guise of incidental trackage rights. There is no trackage rights agreement between WSRY and TP&W whereby TP&W grants WSRY the right to operate over the TPW Line pursuant to trackage rights. US Rail seeks an exemption to lease and operate incidental trackage rights over the TPW Line that it claims

WSRY obtained through a Trackage Rights Agreement dated July 17, 1995 between WSRY and the A. & R. Line, Inc. (“A&R”) (the “TRA”).¹

On December 8, 2008, TP&W notified WSRY that WSRY was in default under the TRA and on January 2, 2009, TP&W terminated the TRA effective January 5, 2009. Therefore, there are no trackage rights to be assigned to US Rail by WSRY. It is uncontested that WSRY did not receive authority to operate pursuant to the TRA prior to the termination of the TRA by TP&W. See the Notice of Exemption filed by WSRY in *Winamac Southern Railway Company–Trackage Rights Exemption–A. & R. Line, Inc.*, (STB Finance Docket No. 35208) filed on December 11, 2008 (the “*WSRY Proceeding*”).

In the *WSRY Proceeding*, WSRY admitted that it has not previously sought authority from the Interstate Commerce Commission (the “ICC”) or the Board to operate under the TRA. WSRY claimed that it or its agent operated pursuant to the TRA for more than 13 years. Notice at 4. WSRY also claimed that its failure to obtain authority was an “oversight.” Notice at 3. In the *WSRY Proceeding*, TP&W also sought a stay and contested WSRY’s claim that either WSRY had operated the TPW Line or that an agent had operated the TPW Line for WSRY. Regardless, no authority has been obtained for the TRA and the TRA no longer exists.

The Board will not permit operations under trackage rights unless there is an agreement between the parties. See 49 C.F.R. §1180.2(d)(7) (exempting trackage rights if they are based on a written agreement) and 49 C.F.R. §1180.6(a)(7)(ii) (requiring the submission of a written trackage rights agreement for exempted trackage rights). As shown in Exhibit A, the TRA has

¹ A&R was merged into TP&W. See *RailAmerica, Inc., Et Al.–Control and Merger Exemption–A&R Line, Inc., and J.K. Line, Inc.*, STB Finance Docket No. 34269 (STB served December 12, 2002).

been terminated and there is no TRA for WSRY to assign to US Rail and no trackage rights agreement under which US Rail can obtain incidental trackage rights.

The Board rejected the Notice in the WSRY Proceeding because of the conflict concerning the existence of the TRA. See *Winamac Southern Railway Company—Trackage Rights Exemption—A. & R. Line, Inc.*, (STB Finance Docket No. 35208) served January 9, 2009 (the “*Trackage Rights Rejection*”). Therefore, WSRY does not have authority to operate over the TPW Line and there are no trackage rights to assign to US Rail.

TP&W will now demonstrate that the Board should stay the effectiveness of the Notice.

A STAY OF THE NOTICE IS JUSTIFIED

1. There is a strong likelihood that TP&W will prevail on the merits.

US Rail’s Notice is fatally flawed. Since TP&W terminated the TRA, there is no written trackage rights agreement to be assigned to US Rail by WSRY. Therefore, there are no incidental trackage rights for US Rail to acquire or operate under.

In its Petition to Stay in the *WSRY Proceeding*, TP&W fully explained that there is no trackage rights agreement granting WSRY the right to operate over the TPW Line. In lieu of repeating those arguments, TP&W adopts and incorporates by reference the arguments made by it in the *WSRY Proceeding* in this petition.

TP&W will prevail on the merits because there is no trackage rights agreement between WSRY and TP&W, as successor by merger to A&R, over the TPW Line for WSRY to assign to US Rail. By letter dated January 2, 2009, TP&W terminated the TRA. See Exhibit A.

Even before TP&W terminated the TRA, the TRA ceased to be a binding agreement because WSR Y had abandoned the agreement² under Indiana law. The delay of 13 years between the execution of the TRA and any performance by WSR Y indicates an abandonment of the trackage rights agreement. This is particularly true in light of the fact that the TRA itself calls for a revision of the trackage rights charge on “July 1 of each year” (Section 8.03(b)), and provides for a renegotiation of the compensation under the contract “every (5) years from the Effective Date” (Section 8.03(e)). In short, the TRA’s terms show that the parties expected that the TRA would be in effect in July of 1997 and subject to renegotiation every five years. Instead, nothing has happened and neither party has raised an objection, supports an argument that the TRA has been abandoned.

Even if the agreement had not previously been abandoned by WSR Y, the contemplated assignment is not valid under Indiana law absent the consent of the TP&W. *Navin v. New Colonial Hotel*, 90 N.E.2d 128, 133-34 (Ind. 1950)(wherein the Indiana Supreme Court held that “[w]ithout the consent of the adverse party, rights which are coupled with liabilities under a contract cannot be assigned in such a way that the assignor no longer remains liable”).

Finally, since the TRA has been terminated, the Board “has no general power to require a carrier to grant trackage rights over its lines.” *Chesapeake & Ohio Railway Co.-Abandonment*, 366 I.C.C. 53, 54 (1981) (internal citations omitted). Indeed, if WSR Y and US Rail seek to force involuntary access over the TPW Line, there are specific provisions of the 49 U.S.C. Subtitle IV, Part A that will allow them to prosecute an adverse request for access. Since the Board rejected the Notice in the *WSR Y Proceeding in the Trackage Rights Rejection*, there are no incidental

² Abandonment of an agreement under Indiana law is not the same as an abandonment under 49 U.S.C. §10903.

trackage rights to be assigned to US Rail. TP&W respectfully requests the Board to at a minimum stay that portion of the Notice seeking exemption to lease and operate incidental trackage rights over the TPW Line.

As demonstrated above, there is a strong likelihood that TP&W will prevail on the merits. Therefore, a stay is warranted.

2. TP&W will suffer irreparable harm in the absence of a stay.

US Rail's operation over the TPW Line in the absence of an agreement is unlawful. In addition, operation over the TPW Line without an agreement between TP&W and US Rail will create safety and liability issues. In compliance with FRA requirements, TP&W requires railroads operating on its lines to qualify their employees and particularly their engineers. TP&W cannot compel US Rail's compliance since there is no agreement. Further, there is no agreement or protocol for joint operation over the TPW Line. In addition, there is no requirement for US Rail to comply with TP&W's dispatching rules.

TP&W also faces liability for US Rail's operations over the TPW Line. As the Board is well aware, typical trackage rights agreements assign liability and require insurance to protect the landlord. Since there is no agreement covering the WSRV or US Rail operations over the TPW Line, there is no allocation of liability or provision for insurance, exposing TP&W to unknown and potentially ruinous liability for US Rail's actions on TP&W's property.

The safety and liability issues raised by US Rail's proposed operations over the TPW Line without a written agreement create the strong likelihood of irreparable harm to TP&W.

3. A stay will not substantially harm other interested parties.

A stay will not harm US Rail. US Rail will be able to operate over the other WSRV lines and can either reach a new agreement with TP&W to operate over the TPW Line or make use of

TP&W's intermediate switching to traverse the TPW Line. US Rail also has the option of interchanging traffic with TP&W for movement over the TPW Line.

4. The public interest supports the granting of the stay.

The status quo in this instance is in the public interest. Rail service will continue. There is no need to create confusion by providing US Rail a colorable, but nonetheless invalid argument concerning its right to operate over the TPW Line under an invalid assignment of the terminated TRA.

CONCLUSION

TP&W has demonstrated that a stay of the Notice would be consistent with STB precedent. The Board has agreed and rejected the notice filed in the *WSRY Proceeding* in the *Trackage Rights Rejection*. Therefore, TP&W respectfully requests that the STB stay the Notice.

Respectfully Submitted,

Scott G. Williams Esq.
Senior Vice President & General Counsel
RailAmerica, Inc.
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256
(904) 538-6329



Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer
600 Baltimore Avenue
Suite 301
Towson, MD 21204
(202) 466-6532
Lou_Gitomer@verizon.net

Attorneys for: TOLEDO, PEORIA AND
WESTERN RAILWAY CORPORATION

Dated: January 9, 2009

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this Petition for Stay upon all parties of record in this proceeding, by electronic delivery.



Louis E. Gitomer
January 9, 2009

EXHIBIT A-TERMINATION LETTER

January 2, 2009

Mr. Raymond L. Ortman
President
Winamac Southern Railway Company
P.O. 55
Kokomo, IN 46903

Re: July 17, 1995 Trackage Rights

Dear Mr. Ortman:

We have received your letter of December 12, 2008. The analysis in your letter concerning the assignment issue has been reviewed by our counsel and they have come to a different conclusion. Therefore, the Toledo, Peoria & Western Railway Corporation ("TP&W") terminates the July 17, 1995 Trackage Rights Agreement pursuant to Article Seven as of January 5, 2009.

TP&W is willing to negotiate a new arrangement for the access sought by the Winamac Southern Railway Company.

Sincerely yours,



J. B. Ovitt
Regional Vice President - Midwest

Copy to: S. Franger, P. Crawford – RailAmerica via email
G. Hall, B. Ortman, S. Ortman – WSRV/ Kokomo Grain via email

