

BALL JANIK LLP

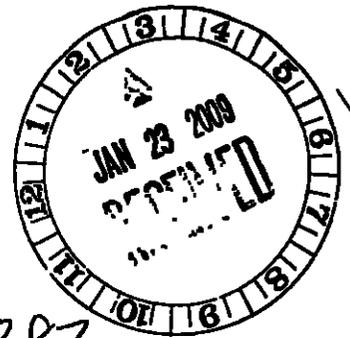
A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D C 20005

www.balljanik.com

TELEPHONE 202 638 3307
FACSIMILE 202 783 6947

IRENE RINGWOOD



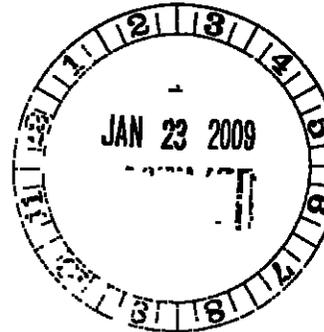
224387

iringwood@balljanik.com

January 23, 2009

Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S W , Room 1116
Washington, DC 20423-0001

ENTERED
Office of Proceedings
JAN 23 2009
Part of
Public Record



Re STB Finance Docket No 35187, Grand Elk Railroad, LLC - Lease and Operation Exemption - Norfolk Southern Railway Company

Dear Acting Secretary Quinlan

Attached are the original and ten (10) copies of Grand Elk Railroad's Reply to the Brotherhood of Locomotive Engineers & Trainmen/Michigan Legislative Board Petition for Stay

Please time and date stamp the extra copy of the Reply and return it with our messenger

If you have any questions, please contact me

Sincerely yours,

Irene Ringwood

Irene Ringwood

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO 35187

GRAND ELK RAILROAD, L L C.
--LEASE AND OPERATION EXEMPTION--
NORFOLK SOUTHERN RAILWAY COMPANY

REPLY TO BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND
TRAINMEN/MICHIGAN LEGISLATIVE BOARD'S
PETITION FOR STAY



ENTERED
Office of Proceedings

JAN 23 2009

Part of
Public Record

KARL MORELL
IRENE RINGWOOD
BALL JANIK LLP
Suite 225
1455 F Street, N W
Washington, D C 20005
(202) 638-3307

Attorneys for
GRAND ELK RAILROAD, L.L C.

Dated. January 23, 2009



BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO 35187

GRAND ELK RAILROAD, L L C.
--LEASE AND OPERATION EXEMPTION--
NORFOLK SOUTHERN RAILWAY COMPANY

REPLY TO BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND
TRAINMEN/MICHIGAN LEGISLATIVE BOARD'S
PETITION FOR STAY

Grand Elk Railroad, L L C ("GER"), hereby replies in opposition to the Brotherhood of Locomotive Engineers and Trainmen/Michigan Legislative Board's ("BLET/MLB") Petition for Stay filed with the Surface Transportation Board ("Board") on January 21, 2009 ("Petition")¹

PROCEDURAL BACKGROUND

On November 3, 2008, GER filed its Verified Notice of Exemption, pursuant to 49 C F R. Part 1150, Subpart D—Exempt Transactions, to permit GER to lease and operate approximately 122.9 miles of rail lines owned by Norfolk Southern Railway Company ("NS") in Michigan and Indiana ("Notice of Exemption") In the Notice of Exemption, GER explained that its projected annual revenues may exceed \$5 million and that, consequently, GER was in the process of complying with the notice requirements of 49 C.F R § 1150.32(e) On November 25,

¹ BLET/MLB also filed its Petition in STB Finance Docket No. 35188, *Walco Companies, Inc – Continuance In Control Exemption – Grand Elk Railroad, L L C* (not printed), notice served November 17, 2008 The Notice of Exemption in that proceeding became effective on December 3, 2008, thus, rendering moot BLET/MLB's Petition in that proceeding.

2008, GER certified its compliance with Section 1150 32(c) On December 1, 2008, GER revised its certification.

On November 26, 2008, the Michigan Economic Development Corporation (“MEDC”) filed a request to stay the notice of exemption GER filed a reply in opposition on December 12, 2008, and NS filed a reply in opposition on December 15, 2008 By decision served December 22, 2008, in this proceeding, MEDC’s stay request was denied

On December 22, 2008, United Transportation Union filed a Petition for Stay. Replies to the Petition for Stay were filed by NS on December 23, 2008, and by GER on December 24, 2008. On January 12, 2009, Senator Basham filed the comments in this proceeding (“Comments”). GER replied to the Comments on January 16, 2009 On January 21st, BLET/MLB filed the Petition to which this reply is addressed ²

REPLY

The standards governing disposition of a request 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) (“*Petroleum Jobbers*”). 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), and the movant carries the burden of persuasion on *each* of the four

² The BLET/MLB Petition is not signed, nor is there a signed certificate of service GER responds to the Petition assuming that the Board chooses to overlook these deficiencies.

elements required for the extraordinary relief. *Canal Authority of Fla V Callaway*, 489 F 2d 567, 573 (5th Cir. 1974)

As is demonstrated below, BLET/MLB has failed to meet the stay criteria BLET/MLB has not shown that there is a strong likelihood it will prevail on the merits, that it will suffer irreparable harm in the absence of a stay, that a stay would not substantially harm other parties, or that granting a stay would be in the public interest

BLET/MLB Is Unlikely To Prevail On The Merits

BLET/MLB does not seriously contend, much less demonstrate, that it will prevail on the merits in this proceeding. BLET/MLB has not demonstrated, and cannot demonstrate, that GER's Notice of Exemption fails to comply with the Board's applicable regulations or that the proposed transaction does not qualify for the class exemption

BLET/MLB's request for stay is based primarily on the alleged, but undemonstrated, harm that certain of its members will suffer as a result of this transaction. But that is an issue Congress addressed in 1995 when it amended 49 U.S.C. § 10901 so as to expressly preclude the Board from imposing labor protective conditions in transactions under Section 10901. BLET/MLB is essentially seeking to have the Board circumvent the legislative will of Congress.

It appears that BLET/MLB itself does not have much faith in the merits of its arguments. BLET/MLB has been aware of the proposed transaction and this proceeding for at least two months, which provided BLET/MLB more than adequate time substantively to challenge the Notice of Exemption by filing a petition to revoke. Instead, BLET/MLB waited until nine days before the Notice of Exemption is to become effective to file the Petition. Presumably, BLET/MLB recognized that its substantive arguments were without merit and, therefore, opted to seek, at very last moment, a prolonged procedural delay with motives that can only be

assumed from the BLET/MLB discussions of a proposed settlement in the Michigan Lines proceeding

BLET/MLB does not challenge the applicability of the class exemption at 49 C.F.R. § 1150.31 *et seq.*, to the proposed transaction. BLET/MLB also does not challenge the completeness of the Notice of Exemption. Thus, the Board's scope of review is very narrow, since the Board and its predecessor have already determined that the proposed transaction satisfies the requirements for an exemption under 49 U.S.C. § 10502(a). *See Class Exemption For the Acquisition and Operations of Rail Lines Under 49 U.S.C. 10901*, 11 C.C.2d 810, 817 (1985), *aff'd sub nom Illinois Commerce Commission v ICC*, 817 F.2d 145 (D.C. Cir. 1987).

Because BLET/MLB does not challenge either the applicability of the class exemption or the completeness of the Notice of Exemption, BLET/MLB cannot possibly prevail on the merits.

Denial Of The Stay Will Not Cause BLET/MLB Irreparable Harm

An administrative decision is not ordinarily stayed without an appropriate showing of irreparable harm. *Permian Basin Area Rate Case*, 390 U.S. 747, 777 (1968). BLET/MLB has failed to demonstrate that anyone will suffer irreparable harm in the absence of a stay.

BLET/MLB claims, but submits no supporting evidence, that an unidentified number of BLET/MLB members will be displaced as a result of this proposed transaction. For example, BLET/MLB alleges that some of its members "will be forced to commute long distances" while other members "will be forced to relocate." Petition at 3.

Foremost, BLET/MLB's allegations are highly speculative. In any event, the allegations, even if accurate, do not rise to the level of sustaining a finding of irreparable harm. *See STB Finance Docket No. 34145, Bulkmatc Railroad Corporation – Acquisition Exemption – Bulkmatc Transport Company* (not printed), served December 27, 2001. The showing of "mere

injuries, however substantial, in terms of money expended in the absence of a stay” does not constitute *irreparable* injury because adequate compensatory relief can be had at a later date *Petroleum Jobbers*, at 925 Neither the Board nor the courts have found economic injuries of this nature to be irreparable because they are compensable through reparations See Finance Docket No. 30965 (Sub-No. 1), *Delaware and Hudson Railway Co – Lease and Trackage Rights Exemption – Springfield Terminal Railway Company* (not printed), served July 15, 1988 Indeed, the claimed loss of 72 employees was deemed inadequate by the Board to support a showing of irreparable harm. See STB Finance Docket No 33326, *I&M Rail Link, L I. C – Acquisition and Operation Exemption – Certain Lines of Soo Line Railroad Company D/B/A Canadian Pacific Railway* (not printed), served April 4, 1997

BLET/MLB next contends that GER has misled the Board because Marquette Rail, L.L.C (“Marquette”) allegedly has a direct connection with NS “via the Grand Rapids Terminal Subdivision,” notwithstanding GER’s and NS’s claims to the contrary. Petition at 3. GER and NS have previously demonstrated in this proceeding that Marquette has *never* had a direct connection with NS at Grand Rapids The only interchange connection between NS and Marquette at Grand Rapids, MI is via an interchange switch movement handled by CSX Transportation, Inc. But the Board need not accept the assertions of GER and NSR – it need only look back to the relief sought by Marquette in the Michigan Central proceeding to understand that not even Marquette believes it has a direct connection with NS at Grand Rapids! See, Comments and Request for Conditions of Marquette Rail, L.L.C , submitted September 18, 2007, in STB Finance Docket No. 35063, *Michigan Central Railways, L L C – Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company*, at 19-20 (“As a condition of any exemption authority, MCR should be required to participate with Marquette Rail in the

construction of the previously-planned connector at Turner Street in Grand Rapids, with each party responsible for the construction expenses on its right of way ")

In any event, Marquette and GER have reached a settlement, which GER anticipates will be filed with the Board over the coming few days. That settlement anticipates the potential construction of a direct connection in the event the proposed transaction is consummated, precisely where BLET/MLB claims a direct connection already exists. It is not GER and NS that have misled the Board.

BLET/MLB next claims that GER's estimated carloads of "22,000 units per year . is substantially low " Petition at 4. BLET/MLB further claims that the rail yard activity in Botsford Yard will "exceed the threshold of 100% contained in 49 C.F.R. § 1105.7(e)(5)(b), therefore requiring an environmental report." Petition at 3. GER's estimated annual carloads are based on actual traffic information, market research and informed projections. While GER certainly hopes that it can halt and reverse the decline in carloadings on the line over time, it is required to be rational in its projections. GER is in this market to make money, and to do that it will have to develop traffic, but given the base load traffic, the historic *decline* in carloads, and the economic conditions that are reaching all sectors of the economy, GER has reasonably projected that there will be no significant *increase* in traffic from the level handled by NS today and, therefore, no need for an environmental report.

Further, as GER has previously noted in this proceeding, Botsford Yard will not see an increase in traffic in the immediate future, contrary to BLET/MLB's allegation. In fact, the level of traffic will decline since the yard will no longer handle westbound traffic to Niles or eastbound traffic to Battle Creek, Jackson, Ypsilanti, Wayne and other locations

Cars will continue to be blocked out of Elkhart, IN for Kalamazoo, MI and Grand Rapids. Cars destined for the Grand Rapids area, however, will not come into the Botsford Yard but will be taken directly to Hughart Yard for switching. In fact, GER's operating plan contemplates keeping as many cars as possible out of Botsford Yard.

BLET/MLB refers to an arrangement between NS and "CN Railroad" ("CN") which BLET/MLB maintains may not be renewed by CN. BLET/MLB contends that the cancellation of this arrangement would result in a significant number of cars now being handled by CN moving into Botsford Yard "possibly causing significant environmental impact." Petition at 4. While GER is not familiar with the NS-CN arrangement, GER has not agreed to take over any CN traffic in the area. Also, any CN traffic moving into Botsford Yard would necessarily be an entirely new and different transaction. Consequently, the NS-CN arrangement, whether cancelled or not, will have no impact, environmental or otherwise, on this proceeding.

BLET/MLB mistakenly contends that GER's operations into and out of Botsford Yard "will double and possibly triple delay times at crossings." Petition at 4-5. As GER has previously noted in this proceeding, its operations into and out of Botsford Yard will be no different than NS's current operations at the Yard. In fact, any congestion in the area should be reduced due to the fact that GER will be running one less train a day through Kalamazoo.

BLET/MLB also mistakenly claims that GER "will run its trains during daylight hours which will compound the problem due to the fact that this is the peak time for vehicle traffic in Kalamazoo." Petition at 5. GER's operating plan anticipates that GER manifest trains coming on duty at Kalamazoo at 3 a.m., and having traversed through Kalamazoo by 4 a.m., or earlier, since those trains are scheduled to arrive at Elkhart by 7 a.m., daily. Only 2 trains a day will operate in Kalamazoo during daylight hours and those will be used to service local customers.

BLET/MLB claims that there “are 28 crossings identified by MDOT as being deficient and in need of immediate repair, with a projected cost of 1.4 million dollars.” Petition at 5. As GER has previously noted in this proceeding, this claim even if correct, would be all the more reason for the Board to permit GER to take over the operation and maintenance functions on the Line as soon as possible. GER has begun discussions with the Michigan Department of Transportation (“MDOT”) and is prepared to work with MDOT to ensure that all grade crossings are maintained in compliance with Federal and state standards. BLET/MLB fails to explain the source of the alleged cost of repairing the crossing and its projected costs are inconsistent with GER’s estimates and GER’s discussions with the MDOT concerning the crossings.

BLET/MLB is also concerned that the Dunn & Bradstreet (“D&B”) rating for Watco Transportation Services “could greatly limit their access to the substantial amounts of financial resources they will need if they are going to be able to make the capital improvement.” Petition at 5. These concerns are misplaced for a number of reasons. First, Watco Transportation Services is a subsidiary of Watco Companies, Inc. (“Watco”), not Watco itself. Second, the D&B rating cited by BLET/MLB is not based on data supplied by Watco or Watco Transportation Services. Neither company subscribes to D&B and neither company provides D&B any financial information as to Watco and Watco Transportation Services. Consequently, neither is aware of the sources of information that form the basis of the rating for Watco Transportation Services or the accuracy of the information. Also, a D&B rating does not reflect the capitalization of a company or the sources of financing readily available to a company.

More importantly, GER has made a contractual commitment to NS to upgrade and maintain the Line to agreed-upon minimum standards. The penalty for failure to keep that commitment is grounds for termination of the Lease Agreement between GER and NS. GER

would not have made such a commitment if it were not certain of its ability to raise the necessary capital (either through capital contributions from Watco or financing).

Finally, BLET/MLB is concerned that GER may not have the resources to pay for a major Hazmat spill which “would leave the citizens of the State of Michigan to pay the bill ” Petition at 6. BLET/MLB’s concern is misplaced in at least two respects. GER is contractually obligated to carry significant insurance to cover such losses. But much more fundamentally, GER recognizes the value of a safe operation, and will enter into this transaction with safety as its number one goal.

A Stay Would Harm Shippers And GER

GER intends to upgrade the tracks and, as a short line operator, improve service to the shippers located on the leased lines. Thus, delaying the implementation of the involved transaction will have a material, adverse effect on the shippers located on the leased lines by delaying the benefits they will realize once GER commences operations. Any delay in GER’s operations will cause GER to incur significant expenses, resulting in a loss of business that will be unrecoverable and cause uncertainty among its employees and the shippers located on the leased rail lines.

GER plans to spend \$2.7 million on track rehabilitation once it leases the lines from NS, including the replacement of 20,000 ties and the rehabilitation of two yards. GER’s planned rehabilitation program will create new jobs and infuse money into the ailing Michigan economy. Any significant delay in the effective date of the Notice of Exemption will jeopardize GER’s ability to complete the rehabilitation program during the next construction season. Also, contrary to BLET/MLB’s contention, GER will be hiring more employees than are currently working on the lines. Consequently, GER’s lease of the lines will not only improve service to

the shippers on the leased lines but will also infuse capital into the Michigan economy and increase jobs at this critical time

A Stay Is Not In The Public Interest

BLET/MLB has failed to demonstrate how issuance of a stay would further the public interest. BLET/MLB attempts to bootstrap the arguments raised by the MEDC and Marquette earlier in this proceeding. But MEDC's arguments have already been rejected by the Board in a decision served in this proceeding on December 22, 2008, and, as previously discussed, GER has reached a settlement with Marquette that addresses Marquette's concerns.

On the other hand, GER's proposed change in operations is intended to increase the efficiency of rail operations in the area, improve service to the shippers and increase jobs on the leased rail lines. For more than two decades, the Board and its predecessor have consistently stated that the public interest is served by encouraging the formation of short line and regional carriers. Consequently, granting the stay would be contrary to the public interest.

CONCLUSION

GER respectfully urges the Board to deny BLET/MLB's Stay Request. The Stay Request falls woefully short of meeting the criteria for a stay.

Respectfully submitted,



KARL MORELL
IRENE RINGWOOD
BALL JANIK LLP
Suite 225
1455 F Street, N W
Washington, DC 20005
(202) 638-3307

Attorneys for
GRAND ELK RAILROAD, LLC

Dated: January 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2009, I have caused a copy of the foregoing Reply to be served on all parties of record.

Irene Ringwood

Irene Ringwood