

45724
EB

SERVICE DATE – MARCH 14, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36099

INDIANA HARBOR BELT RAILROAD COMPANY—TRACKAGE RIGHTS—
CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION, INC., AND
NORFOLK SOUTHERN RAILWAY COMPANY

Docket No. FD 36100

CSX TRANSPORTATION, INC.—TRACKAGE RIGHTS—CONSOLIDATED RAIL
CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

Docket No. FD 36101

NORFOLK SOUTHERN RAILWAY COMPANY—TRACKAGE RIGHTS—
CONSOLIDATED RAIL CORPORATION AND CSX TRANSPORTATION, INC.

Docket No. FD 36102

CONSOLIDATED RAIL CORPORATION—TRACKAGE RIGHTS—CSX
TRANSPORTATION, INC. AND NORFOLK SOUTHERN RAILWAY COMPANY

Digest:¹ The Board denies the petition of Soo Line Railroad Company, d/b/a
Canadian Pacific, for a stay of the effective date of the exemptions sought in these
proceedings.

Decided: March 13, 2017

On February 13, 2017, the Indiana Harbor Belt Railroad Company (IHB), Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NSR) (collectively, the Parties) filed four combined verified notices of exemption in these four dockets pursuant to the class exemption at 49 C.F.R. § 1180.2(d)(7) for trackage rights over rail lines and ancillary trackage owned by Conrail, CSXT, and NSR in the vicinity of Gibson and Ivanhoe, Ind., and Calumet Park, Ill. The Parties state that the trackage rights are

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

pursuant to a written trackage rights agreement (Agreement) to be entered into among IHB, Conrail, CSXT, and NSR.²

According to the Parties, IHB, which is 51%-owned by Conrail, has previously operated under 99-year trackage rights agreements with predecessors in interest of Conrail, dated April 9, 1906 (1906 Agreement) and September 30, 1913 (1913 Agreement). Pursuant to a transaction agreement approved by the Board in CSX Corp.—Control & Operating Leases/Agreements—Conrail, Inc., 3 S.T.B. 196 (1998), portions of the IHB-operated properties owned by Conrail were allocated to New York Central Lines LLC and Pennsylvania Lines, LLC, and subsequently to CSXT and NSR. See CSX Corp.—Control & Operating Leases/Agreements—Conrail, Inc., 7 S.T.B. 205 (2003). As part of the approved transaction, CSX Corporation and Norfolk Southern Corporation entered into an agreement (the IHB Agreement) that gave CSXT and NSR full, joint, and equal use of the Rail Properties, including trackage rights over those properties. See CSX Corp., 3 S.T.B. at 228-229 (including the Rail Properties among the “Other Areas with Special Treatment” that are “subject to special arrangements that provide for a sharing of routes or facilities to a certain extent”). The 1906 Agreement and 1913 Agreement expired by their terms, respectively, in 2005 and 2012.

² In Docket No. FD 36099, Conrail, CSXT, and NSR have agreed to grant IHB local and overhead trackage rights: (1) over CSXT’s Kensington Branch (a/k/a East-West Line), between CSXT milepost 259.4 at the Ivanhoe intersection in Gary, Ind., and Conrail milepost 266.6 at the intersection of Alice Avenue in Calumet City, Ill., including ancillary trackage; (2) over NSR’s Danville Branch (a/k/a the Indiana Harbor Line), between milepost 0.0 at the intersection of Block Avenue in East Chicago, Ind., and milepost 6.30+/- at the intersection of Little Calumet River in Hammond, Ind., including ancillary trackage; (3) over Conrail’s Dune Park Branch, between milepost 1.80 at the Ivanhoe intersection in Gary, Ind., and milepost 4.63 at the intersection of Chase Street in Gary, Ind., including ancillary trackage; (4) over Conrail’s Kensington Branch, between Conrail milepost 266.6 at the intersection of Alice Avenue in Calumet City, Ill., and milepost 270.6 at the intersection of 124th Street in East Chicago, Ind., including ancillary trackage; (5) over Conrail’s Cast Armour Lead (between the intersections of Dickey Road and Canal Street in East Chicago, Ind.) and Harbison Walker Lead (between the intersections of Indiana Harbor Canal and Kennedy Avenue in East Chicago, Ind.); and (6) over Conrail’s Gibson Yard (between Howard Avenue and Kennedy Avenue in Hammond, Ind.), Gibson Transfer Yard (between Kennedy Avenue and Ivanhoe intersection in Gary, Ind.), and Michigan Avenue Yard (between Michigan Avenue and 144th Street in East Chicago, Ind.) (the Rail Properties). In Docket Nos. FD 36100, 36101, and 36102, Conrail, CSXT, and NSR will grant each other local and overhead trackage rights over each other’s lines and ancillary trackage described above.

The Parties state that the purpose of the trackage rights in Docket No. FD 36099 is to allow IHB to continue its operations over the Rail Properties under modern trackage rights terms, and to provide common terms for reciprocal operations by Conrail, NSR, and CSXT over the Rail Properties. The Parties state that the purpose of the trackage rights in Docket Nos. FD 36100, 36101, and 36102 is to: (1) recognize the rights of CSXT and NSR for full, joint, and equal operations over the Rail Properties, including trackage rights, as authorized by the IHB Agreement, (2) grant Conrail equivalent trackage rights over CSXT's and NSR's lines, and (3) provide common terms for such trackage rights operations. A combined notice of exemption was served and published in the Federal Register on March 1, 2017 (82 Fed. Reg. 12,272). The exemptions are scheduled to become effective on March 15, 2017.

On March 8, 2017, Soo Line Railroad Company, d/b/a Canadian Pacific (CP) filed a petition to stay the effectiveness of the exemptions. CP argues that a stay is warranted because Conrail, CSXT, and NSR procured IHB's approval of the Agreement through breaching their fiduciary duties under Indiana state law as shareholders of IHB. (Pet. 2.) CP states that, as the sole minority shareholder of IHB,³ it recently filed an action in the United States District Court for the Northern District of Indiana (District Court) asserting state law claims for breach of fiduciary duties against the Parties.⁴ (Id.) In its complaint before the District Court, CP states that it has requested that the court void, in part, the Agreement. (Id.)

CP states that, while the 1906 Agreement and 1913 Agreement expired by their terms in 2005 and 2012, respectively, IHB continues to operate over and invest in the Rail Properties without interruption. (Pet. 4.) CP states that it has engaged in negotiations in recent years with IHB management, Conrail, CSXT, and NSR to develop a new agreement and that IHB management proposed new annual rental payments in the fall of 2016. (Pet. 4-5.) CP alleges that IHB management was then coerced to change its position and that IHB was compelled to adopt the unfavorable rental rates included in the Agreement. (Pet. 6.) CP states that the pending litigation in District Court is a result of Conrail's, CSXT's, and NSR's alleged coercion and breach of fiduciary duties and that the Board should stay the effective date of the notices of exemption pending the outcome of the litigation. CP alternatively requests that, if the Board decides a stay is not warranted, the Board make clear that its issuance of the exemptions does not constitute a ruling, on the merits or otherwise, with respect to the pending District Court litigation. (Pet. 13.)

On March 10, 2017, the Parties filed a reply to CP's petition arguing that the requirements for a stay have not been met and that, consistent with Board precedent, state law

³ IHB is 51%-owned by Conrail and 49%-owned by CP. CP states that Conrail is owned by CRR Holdings, LLC, which in turn, is owned exclusively by CSXT's and NSR's parent corporations, CSX Corporation and Norfolk Southern Corporation.

⁴ See Soo Line R.R. Co. v. Consol. Rail Corp., 2:17-cv-00106-RL-APR (N.D. Ind. Mar. 8, 2017). A copy of the complaint is attached as Exhibit 1 to CP's petition.

disputes regarding a transaction need not be resolved before the Board's permissive authority is allowed to take effect.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. In ruling on a petition for stay, the Board considers: (1) whether the party seeking the stay has made a strong showing that it is likely to prevail on the merits; (2) whether the party seeking the stay will suffer irreparable harm in the absence of a stay; (3) whether other interested parties will be substantially harmed by a stay; and (4) the public interest in granting or denying the stay. See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). A 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); Enterger Ark., Inc. v. Union Pac. R.R., NOR 42104, slip op. at 2 (STB served April 25, 2011).

For the reasons discussed below, the Board finds that CP has failed to demonstrate that irreparable harm will occur to CP or IHB if a stay is not granted. Therefore, the Board will deny CP's petition for stay but notes that the Board's exemption authority is permissive only and does not constitute a ruling with respect to the pending litigation before the District Court.

CP has not demonstrated that it or IHB will suffer irreparable harm without the imposition of a stay.⁵ As CP acknowledges (Pet. 10-11), the party seeking a stay must demonstrate that the injury claimed is "imminent, 'certain and great.'" Sault Ste. Marie Bridge Co.—Acquis. & Operation Exemption—Lines of Union Pac. R.R., FD 33290, slip op. at 6 (STB served Jan. 24, 1997) (quoting Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)). Here, CP alleges that the Agreement "would drastically reduce IHB's cash position, making it difficult to prepare for exigencies and make needed investments in the Rail Properties." (Pet. 11.) CP alleges that "[t]his in turn jeopardizes the efficient flow of traffic" through the Chicago terminal. (*Id.*) As CP acknowledges, economic loss by itself does not generally constitute irreparable harm. See Del. & Hudson Ry.—Lease & Trackage Rights—Springfield Terminal Ry., FD 30965 (Sub-No. 1) (ICC served Nov. 2, 1995). Moreover, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Sampson v. Murray, 415 U.S. 61, 88-92 (1974) (quoting Va. Petroleum Jobbers Ass'n, 259 F.2d at 925). Here, CP acknowledges that IHB's management does not believe that the rates in the Agreement would

⁵ The Parties' reply suggests that CP may lack standing to assert irreparable injury to IHB. (See Parties Reply 5-6.) Because the Board finds that neither CP nor IHB will suffer irreparable harm absent a stay, the Board need not determine whether CP has standing to make its claim on behalf of IHB.

lead to IHB's insolvency. (Pet. 11.) Moreover, the alleged impact of the Agreement on IHB's ability to invest in the Rail Properties, and the consequences that CP predicts on operations in the Chicago terminal, are remote, speculative, and unsupported, not imminent and certain as required for a showing of irreparable harm. Further, the Parties explain that they have strong incentives to ensure that IHB's operations are supported, as CSXT and NSR have their own respective operations on lines supervised, maintained, and dispatched by IHB, and they depend on IHB for substantial switching services in the Chicago terminal. (Parties Reply 6.)

Because CP has not demonstrated that irreparable harm will occur if a stay is not granted, the petition for stay will be denied and the Board need not address the remaining stay criteria. See 49 U.S.C. §1321(b)(4); Trinidad Ry.—Aban. Exemption—in Las Animas Cty., Colo., AB 573X et al., slip op. at 3 (STB served Jan. 15, 2002).

To the extent CP argues a stay is warranted because the notice of exemption process is not appropriate given the complexities of issues underlying the pending litigation, that argument is likewise rejected. (Pet. 9.) CP explicitly states that it “does not seek a rejection of the Notices.” (Pet. 10.) Nor does CP allege that the verified notices are false or misleading. There is no indication that the Parties have failed to comply with the requirements of the class exemption. Nor is there any dispute that there is an agreement among the Parties, and it is that agreement upon which the notice of exemption before the Board is based. Rather, CP's opposition is based on whether fiduciary duties were breached in procuring IHB's approval of the Agreement, an issue which is currently being litigated in the District Court. If the District Court voids the Agreement, CP may file a petition to reject or revoke the notices at that time.

Therefore, the exemptions will become effective, as scheduled, on March 15, 2017. However, as the Board has stated and as CP has noted, the Board's exemption authority is permissive. See Grand Elk R.R.—Acquis. of Incidental Trackage Rights Exemption—Norfolk S. Ry., FD 35187 (Sub-No. 1) (STB served Nov. 1, 2016); Wis. Cent. Ltd.—Trackage Rights Exemption—Lines of Union Pac. R.R., FD 35992 (STB served Mar. 4, 2016); Lehigh Ry.—Lease Exemption Containing Interchange Commitment—Norfolk S. Ry., FD 36062 (Oct. 14, 2016). Allowing these exemptions to become effective does not impact the pending litigation in the District Court or constitute a ruling on the parties' contractual relationships. Grand Elk R.R., slip op. at 4. Indeed, as CP points out, the Board has consistently stated that contractual disputes are properly for courts to decide. (Pet. 14.)

It is ordered:

1. CP's petition for stay is denied.
2. The exemptions will become effective, as scheduled, on March 15, 2017.

3. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.