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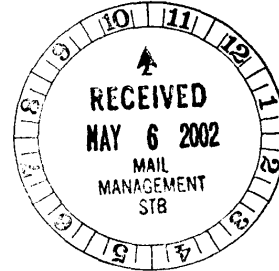
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205 327

May 6, 2002

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



**Re: Finance Docket No. 34182
ISG Cleveland Works Railway Company -- Acquisition and Operation
Exemption -- Rail Lines of The Cuyahoga Valley Railway Company
and River Terminal Railway Company**

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of **ISG Cleveland Works Railway Company Reply to UTU Petition for Stay** dated May 6, 2002. Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

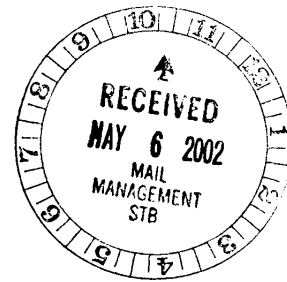
Edward J. Fishman
Attorney for ISG Cleveland Works Railway
Company

Enclosures

cc: Joseph Dettmar

ENTERED
Office of the Secretary
MAY - 6 2002
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34182

ISG CLEVELAND WORKS RAILWAY COMPANY
-- ACQUISITION AND OPERATION EXEMPTION --
RAIL LINES OF THE CUYAHOGA VALLEY RAILWAY COMPANY AND
RIVER TERMINAL RAILWAY COMPANY

ISG CLEVELAND WORKS RAILWAY COMPANY
REPLY TO UTU PETITION FOR STAY

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**ATTORNEYS FOR ISG CLEVELAND
WORKS RAILWAY COMPANY**

Dated: May 6, 2002

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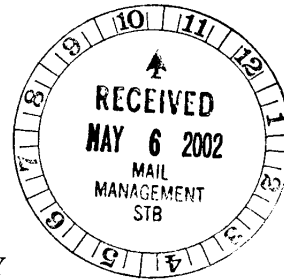
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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34182



ISG CLEVELAND WORKS RAILWAY COMPANY
-- ACQUISITION AND OPERATION EXEMPTION --
RAIL LINES OF THE CUYAHOGA VALLEY RAILWAY COMPANY AND
RIVER TERMINAL RAILWAY COMPANY

ISG CLEVELAND WORKS RAILWAY COMPANY
REPLY TO UTU PETITION FOR STAY

ISG Cleveland Works Railway Company ("CWRO") hereby files this reply to the petition for stay filed May 3, 2002 by the United Transportation Union ("UTU") in the above-referenced proceeding. The Surface Transportation Board ("STB" or "Board") should deny UTU's petition for stay, which is nothing more than a last-gasp attempt to delay CWRO's acquisition of the railroad lines and trackage rights of The Cuyahoga Valley Railway Company ("CVRC") and River Terminal Railway Company ("RTRC").

UTU has failed to establish that a stay of the effective date of the Verified Notice of Exemption filed by CWRO is warranted under the applicable criteria. UTU is not likely to prevail on the merits of its petition to revoke the notice and will not suffer any irreparable harm in the absence of a stay. On the other hand, the interests of CWRO (and its affiliates) and of the public will be substantially harmed if UTU's petition for stay is granted. For these and other reasons more fully set forth below, the Board should reject UTU's petition for stay.

STATEMENT OF FACTS

On April 29, 2002, CWRO, a non-carrier and indirect wholly-owned subsidiary of International Steel Group Inc. ("ISG"), filed a Verified Notice of Exemption ("Notice") to

acquire the railroad lines and trackage rights of CVRC and RTRC (the "Subject Lines"), class III rail carrier subsidiaries of LTV Steel Company, Inc. ("LTV"). CVRC and RTRC are terminal/switching railroads that own railroad lines within and in the vicinity of the Cleveland Works steel plant acquired by ISG.¹ In the Notice, CWRO stated that it would operate the Subject Lines upon consummation of the proposed transaction. CWRO Notice of Exemption at 4. The Notice also indicated that CWRO and CVRC/RTRC intended to consummate the transaction on or soon after the date that the Notice became effective and further indicated that the Notice would not become effective prior to the expiration of the 60-day notice period under 49 C.F.R. § 1150.32(e). Id. at 6.

Earlier, on March 7, 2002, ISG, then known as WLR Acquisition Corp., certified to the STB that it had provided notice of the transaction to the employees of CVRC and RTRC. The notice of intent met all of the requirements of 49 C.F.R. § 1150.32(e) and made it very clear that the assets of CVRC and RTRC would be acquired by a single entity. At the time of the filing of the notice of intent, ISG had not adopted its current name and had not established "ISG Cleveland Works Railway Company" as the name of the subsidiary that would acquire the CVRC and RTRC assets. The filing used the name "WLR Railroad Acquisition Company" to identify the subsidiary, clearly indicated that the Board would be notified once the actual name of the acquisition subsidiary was determined and further indicated that the name likely would be determined at the time of the filing of the Notice of Exemption.

On March 11, 2002, UTU wrote to the relevant represented employees informing them that WLR Acquisition Corp. intended to form a subsidiary to acquire the assets of CVRC and RTRC under 49 U.S.C. § 10901, that there would be no labor protection, and that "since the

¹ The former LTV Cleveland Works steel plant is owned by ISG subsidiary ISG Cleveland Inc.

transaction is an asset purchase, under the law the existing collective-bargaining agreements of these properties will in all likelihood not survive.” See March 11, 2002 UTU Letter attached hereto as Exhibit A (emphasis in original).

ARGUMENT

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for a stay. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

A. UTU Has Failed to Establish A Strong Likelihood of Prevailing On the Merits of its Petition to Revoke the CWRO Notice of Exemption

In support of its petition for stay, UTU argues that there is a strong likelihood that it will prevail on its petition to revoke because CWRO improperly filed its notice of exemption under the authority of 49 U.S.C. § 10901. UTU contends that CWRO is acquiring control of two separate carriers and has an obligation to secure control authority pursuant to 49 U.S.C. § 11323. UTU relies on Fox Valley & Western Ltd. – Exempt., Acq. & Oper., 9 I.C.C.2d 209 (1992)(“Fox Valley”). UTU Pet. at 2.

UTU is not likely to prevail on the merits for several reasons. First, a party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns demonstrating that full regulation is needed to carry out the rail transportation policy. See I&M Rail Link, LLC-Acquisition and Operation Exemption-Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, Finance Docket No. 33326 et al. (STB

served Apr. 2, 1997). UTU's petition for revocation is not based on reasonable, specific concerns and UTU has made no showing that full regulation is needed to carry out the rail transportation policy.

In fact, UTU is wrong about the impropriety of CWRO's filing of the notice of exemption under 49 U.S.C. § 10901. CWRO, a non-carrier, will be acquiring the railroad lines of CVRC and RTRC and therefore appropriately has sought an exemption from STB approval under 49 U.S.C. § 10901. See 49 U.S.C. § 10901(a)(4). CWRO is not acquiring the stock or otherwise acquiring "control" of CVRC and RTRC, which will remain in existence as separate entities unaffiliated with CWRO after the consummation of the proposed transaction. Therefore, section 11323 is inapplicable to this transaction.

In Pittsburgh & Shawmut Railroad, Inc. – Acquisition and Operation Exemption – Rail Lines Controlled by Arthur T. Walker Estate Corporation (The Pittsburgh & Shawmut Railroad Company, Red Bank Railroad Company and Mountain Laurel Railroad Company), Finance Docket No. 32903 (STB served May 7, 1996) ("P&S"), the Board considered the very same issue raised here by UTU in a very similar transaction. In that proceeding, non-carrier Pittsburgh & Shawmut filed a notice of exemption under 49 U.S.C. § 10901 to acquire and operate all of the lines of railroad of three separate Class III rail carriers controlled by the Arthur T. Walker Estate Corporation ("ATW"). Pittsburgh & Shawmut asserted that the subject transaction was governed by section 10901 and not section 11323. The Board agreed, reasoning that the three involved carriers comprised the single rail system of ATW and noting that Pittsburgh & Shawmut would acquire the rail lines of, and commence operations on, the three railroads simultaneously and would operate them as a single carrier. See P&S slip op. at 2, n.2. The Board also recognized in P&S that because the transaction involved Class III carriers only, it was immaterial for purposes of employee protective arrangements whether the transaction fell under section 10901 or section 11323. Id.

In this case, non-carrier CWRO filed a notice of exemption under 49 U.S.C. § 10901 to acquire and operate all of the lines of railroad of two Class III rail carriers, CVRC and RTRC,

both of which are controlled by LTV. Like Pittsburgh & Shawmut, CWRO is acquiring the assets of Class III carriers only. Like the three involved Class III carriers in the P&S case, CVRC and RTRC comprise a single rail system. CVRC and RTRC are operated under common management and control, serve the same primary customer, do not compete with each other for traffic, share rail equipment and other rail facilities, and jointly own trackage and other rail structures. Although separate corporate subsidiaries of LTV, CVRC and RTRC have operated with the degree of integration and control necessary to justify application of the "single system" doctrine. See Burlington Northern, Inc. –Control and Merger –St. Louis-San Francisco Railway Company, Finance Docket No. 28583 (Sub-No. 1)(ICC served June 8, 1981), aff'd 671 F.2d 1085 (8th Cir. 1982)(single system found where operations under common management and control and carriers did not compete with each other).² CWRO, like Pittsburgh & Shawmut in the P&S case, will acquire the rail lines of, and commence operations on, the CVRC and RTRC simultaneously and will operate them as a single carrier. See P&S slip op. at 2, n.2.

Finally, as in the P&S case, this transaction involves Class III carriers only, and the assertion raised by UTU is immaterial for purposes of employee protective arrangements. Under 49 U.S.C. § 11326(c), the Board is prohibited from imposing labor protection on section 11323 transactions involving only Class III rail carriers. See David W. Wulfson, Gary E. Wulfson, Lisa W. Cota, Richard C. Szuch, and Peter A. Szuch – Control Exemption –The New York & Ogdensburg Railway Company, Inc., Finance Docket No. 34186 (STB served April 10, 2002); Railamerica, Inc. – Control Exemption – Railtex, Inc., Finance Docket No. 33818 (STB served Jan. 10, 2000).

² See also Robert W. Bethge & Raymond K. Wilson –Control Exemption – Canal Cartage Co., Finance Docket No. MC-F-19525 (ICC served Nov. 29, 1989)(single system found where carriers "depended on their corporate parent for management control and support" and were "integrated on financial, physical and operational levels"); cf. Reliance Group Holdings -- Petition—Declaratory Order, 366 I.C.C. 446 (1982)(ICC refused to apply single system doctrine where carriers served different markets, were not operationally integrated and did not share facilities and equipment).

UTU's reliance on the Fox Valley decision is misplaced because that case involved very different facts and the availability of mandatory labor protection depended on whether the transaction was governed by section 10901 or former section 11343. In Fox Valley, a non-carrier subsidiary of a rail holding company that controlled one Class II and one Class III rail carrier, Fox Valley & Western Ltd ("FV&W"), sought to acquire all of the assets of one Class II rail carrier and two Class III rail carriers under section 10901 and sought to integrate the assets of those carriers into the holding company's existing system. The involved carriers were found to not be a single system. The Interstate Commerce Commission held, under what it called the "unique facts" in the case (Fox Valley, 9 I.C.C.2d at 210), that FV&W's acquisition was governed by former section 11343. UTU has not shown or explained how the Fox Valley case bears on the present case, particularly in light of the paramount importance of labor protection there in contrast to the absolute immateriality of labor protection here. In fact, in its March 11th letter to its members, UTU acknowledged that the transaction would be an asset sale subject to section 10901. See Exhibit A.

In the alternative, UTU argues that this transaction should not be allowed to proceed until 60 days after CWRO files a notice of intent under 49 C.F.R. § 1150.32(e), because "[w]hile WLR Acquisition Corp. filed a notice, CWRO has not filed any notice." UTU Pet. at 3, n.1. This is an absolutely spurious argument. UTU has known for at least 60 days that WLR Acquisition Corp. would be forming a wholly owned subsidiary to acquire the assets of CVRC and RTRC from LTV. UTU has known for at least 60 days that the name of that subsidiary would be established at a later date and that the Board would be informed of the name. Until this eleventh hour, and despite numerous opportunities to do so, UTU failed to object to the sufficiency of the 60-day notice. In addition to having waived its ability to challenge the sufficiency of the 60-day notice, UTU has failed to explain how it has been harmed by the fact that the name of the subsidiary that will acquire the assets of CVRC and RTRC was not specified in the 60-day notice. Therefore, this argument should be rejected out of hand.

B. UTU Has Failed To Establish That It Will Suffer Irreparable Harm In the Absence of a Stay

In support of its petition for stay, UTU asserts that employees of CVRC and RTRC represented by UTU "may" suffer irreparable harm by a premature consummation of the transaction because the closing date "may have some adverse impact on existing employees' retirement plans and benefits." UTU Pet. at 3. UTU fails to provide any specific details about the potential harm that it alleges may occur as a result of the timing of the closing of this transaction. UTU does not explain how such alleged harm is related to the filing of CWRO's notice under section 10901 or how granting the relief it requests in the petition to revoke would alleviate the alleged harm. In fact, in opposing the petition for partial waiver of the 60-day notice period, UTU acknowledged that it has known about the subject transaction since February 27, 2002. UTU Reply in Opposition to Petition for Partial Waiver at 2.

A claim of speculative harm is not enough to support the relief sought by UTU. The party seeking a stay is required to demonstrate that the injury claimed is imminent, "certain and great." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1995). Accordingly, UTU has failed to meet its burden of demonstrating imminent and irreparable harm. Moreover, it is well settled that economic harm to employees is not sufficient to establish the "irreparable harm" required to justify a stay. See Delaware and Hudson Company – Lease and Trackage Right – Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 4)(ICC served Nov. 2, 1995). Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough. Virginia Petroleum Jobbers, 259 F.2d at 925. UTU's speculative concerns about economic loss do not constitute irreparable harm.

C. CWRO and Its Affiliates Will Be Substantially Harmed By A Stay

UTU asserts that CWRO will not be harmed if the Board issues a stay “since it does not appear that the new railroad operation will begin until June 1, 2002.” UTU Pet. at 3. The June 1st date is UTU’s self-serving apparition. CWRO has made plain its plan to consummate the transaction as soon as it is authorized to do so and to commence rail operations on the day of or day after closing. UTU has been well aware of CWRO’s intentions at each step along the way. When CWRO sought partial waiver of the 60-day notice period, UTU replied in opposition and therefore obviously knew CWRO’s intentions. The CWRO Notice of Exemption makes CWRO’s plans clear: “The parties intend to consummate this transaction on or soon after the date this notice becomes effective.” CWRO Notice of Exemption at 6; “CWRO will operate the Subject Lines upon consummation of the proposed transaction.” CWRO Notice of Exemption at 4. If UTU had any doubt about the timing of closing or the commencement of CWRO rail operations, it never bothered to ask CWRO personnel or counsel.

ISG, ISG Cleveland Inc. (the owner/operator of the Cleveland Works steel plant) and CWRO will be substantially harmed if the Board issues a stay. Since April 12th, when ISG acquired LTV’s Cleveland Works steel plant, ISG has paid CVRC and RTRC \$15,493 per day to cover CVRC’s and RTRC’s operating losses. If the Board issues a stay, ISG will continue to pay this amount per day. This payment is in addition to what ISG Cleveland Inc. will pay for rail service when it starts moving product this week.

CWRO has been planning for a transfer of rail operations for several months and gearing its plans towards May 7th for several weeks. ISG Cleveland Inc. commenced steel making operations on May 3rd and plans to begin outbound shipment of product this week. If the Board issues a stay, CWRO would be compelled to put its transfer plans on hold indefinitely and ISG

Cleveland Inc. will be required to coordinate its transportation services with CVRC/RTRC personnel instead of CWRO personnel, all in contradiction to their carefully made and partially implemented plans. Therefore, contrary to UTU's unsupported assertion, CWRO and its affiliates would be substantially harmed if the Board issued a stay.

D. The Public Interest Supports Denial of UTU's Stay Petition

UTU asserts that the public interest supports granting the stay, arguing that proper review of these types of transactions requires that parties adhere to the statutory scheme. UTU Pet. at 3. As explained above, CWRO's notice of exemption was filed appropriately under section 10901. Even if UTU's argument were correct, UTU fails to explain how filing the notice of exemption under section 11323 would "ensure proper review" of the transaction or how doing so relates to its earlier unsupported assertion that employees may be harmed. Under either section 10901 or 11323, CWRO would be entitled to seek any required exemption(s) from prior Board approval and the Board would be prohibited from imposing labor protective conditions. Therefore, UTU has failed to establish that the public interest would be harmed even if it prevailed on the merits.

In fact, the rail transportation policy favors not granting the stay. Congress has concluded that the public has an interest in policies that "minimize the need for Federal regulatory control over the rail transportation system and [] require fair and expeditious regulatory decisions when regulation is required" and "reduce regulatory barriers to entry into and exit from the [railroad] industry" and "provide for the expeditious handling and resolution of all proceedings required or permitted to be brought" before the Board. 49 U.S.C. § 10101(2), (7) and (15).

For these reasons, a stay would be against the public interest. The merits (if any) of UTU's petition to revoke can be addressed in the ordinary course of the Board's proceedings and a stay is not necessary to protect UTU's interests (if any) or support the public interest.

Conclusion

For the foregoing reasons, CWRO respectfully requests that the Board deny the petition for stay filed by UTU in this proceeding.

Respectfully submitted,

By: 

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1800 Massachusetts Avenue – 2nd Floor
Washington, DC 20036
(202) 778-9000

Dated: May 6, 2002

**ATTORNEYS FOR ISG CLEVELAND
WORKS RAILWAY COMPANY**

BYRON A. BOYD, JR.
International President

PAUL C. THOMPSON
Assistant President

DAN E. JOHNSON
General Secretary and Treasurer



March 11, 2002

TO LOCAL UTU MEMBERS OF LOCALS 27, 1661, AND 1748:

Dear Members:

This is in reference to the March 7, 2002 notice pursuant to 49 C.F.R. § 1150.32(e) to the employees of River Terminal Railway Company ("RTRC") and Cuyahoga Valley Railway Company ("CVRC"). The notice provides that WLR Acquisition Corporation ("WLR") intends to form a wholly-owned subsidiary, WLR Railroad Acquisition Company, that will acquire all of the rail lines, rolling stock, and substantially all of the other assets of RTRC and CVRC. In order to obtain approval to undertake this transaction, WLR intends to file a petition for an exemption from the prior approval requirements of 49 U.S.C. § 10901 at the Surface Transportation Board ("STB").

Section 10901 provides in pertinent part:

A person may . . .

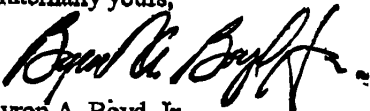
- (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under subsection (c).

This provision does not provide for any labor protection to adversely affected employees. Moreover, since the transaction is an asset purchase, under the law the existing collective-bargaining agreements on these properties will in all likelihood not survive. Also, as a result of the formation of this new railroad, there will be no certified representative on the property. UTU will attempt to organize the new property if there is a sufficient showing of interest by the employees.

WLR claims it will hire the most qualified job candidates. The specifics of WLR's proposed hiring policy are in the notice which is enclosed herewith. If you have any questions, please contact

UTU Vice President Peter L. Patsouras at (216) 221-5498.

Fraternally yours,


Byron A. Boyd, Jr.,
International President

Enclosure

cc: P. C. Thompson, Assistant President
D. L. Hakey, Vice President-Administration
P. L. Patsouras, Vice President
N. R. Hare, General Chairperson - CVRC
L. T. Moore, General Chairperson - CVRC
R. C. Bryant, Jr., General Chairperson - RTRC
D. J. Schuler, General Chairperson - RTRC
C. J. Miller, III, General Counsel
D. R. Elliott, III, Associate General Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **ISG Cleveland Works Railway Company's Reply to UTU Petition for Stay** was served this 6th day of May, 2002 via facsimile and overnight mail upon:

Daniel R. Elliott, III
Associate General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107


Edward J. Fishman