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May 8, 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 the **ISG Cleveland Works Railway Company Reply to UTU Petition for Revoke** dated May 6, 2002. It should be noted that "**Expedited Consideration**" has been requested. Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Edward J. Fishman".

Edward J. Fishman
Attorney for ISG Cleveland Works Railway
Company

Enclosures

**ENTERED
Office of the Secretary**

MAY 08 2002

**Part of
Public Record**

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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 TO REVOKE

EXPEDITED CONSIDERATION OF UTU PETITION TO REVOKE REQUESTED

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**ATTORNEYS FOR ISG CLEVELAND
WORKS RAILWAY COMPANY**

Dated: May 8, 2002

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RIVER TERMINAL RAILWAY COMPANY

ISG CLEVELAND WORKS RAILWAY COMPANY
REPLY TO UTU PETITION TO REVOKE

ISG Cleveland Works Railway Company ("CWRO") hereby files this Reply to the Petition to Revoke 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 to Revoke because UTU has failed to satisfy its burden of establishing that regulation of the proposed transaction is necessary under the rail transportation policy or otherwise justified the relief it requests.

CWRO seeks expedited consideration on UTU's Petition to Revoke for the reasons set forth herein, with a decision issued and effective on or before May 13, 2002.

BACKGROUND

On May 3, 2002, UTU filed a Petition for Stay/Petition to Revoke CWRO's Verified Notice of Exemption in this proceeding. CWRO filed a Reply to UTU's Petition for Stay on May 6, 2002, arguing that UTU had failed to establish that it was entitled to a stay under the applicable criteria because UTU was unlikely to prevail on the merits of its petition to revoke, UTU had failed to demonstrate irreparable harm, and a stay would substantially harm CWRO (and its affiliates) and the public.

On May 6, 2002 the Board issued what it described as a “housekeeping” stay of the effective date of the Verified Notice of Exemption. The Board’s decision granting the stay does not make any findings of fact or conclusions of law to support the stay.¹ Instead, as if the issuance of a stay does not affect the substantial rights of CWRO,² the Board imposed a “housekeeping” stay for an unspecified period of time “to permit the orderly consideration of the arguments raised.” ISG Cleveland Works Railway Company – Acquisition and Operation Exemption – Rail Lines of The Cuyahoga Valley Railway Company and River Terminal Railway Company, Finance Docket No. 34182 (STB served May 6, 2002).

ARGUMENT

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)(“I&M Rail Link”). 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 or that the relief it seeks is otherwise justified.

CWRO, a non-carrier, has sought an exemption from STB approval under 49 U.S.C. § 10901 for its planned acquisition of the railroad lines of The Cuyahoga Valley Railway Company (“CVRC”) and River Terminal Railway Company (“RTRC”). The ICC Termination Act of 1995, Pub. L. No 104-88, 109 Stat. 803 (“ICCTA”), explicitly provides that acquisitions of rail lines by non-carriers are governed by 49 U.S.C. § 10901. See 49 U.S.C. 10901(a)(4) (authorizing acquisition of rail line by a “person other than a rail carrier”). In establishing a new

¹ See Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)(the party seeking a stay carries the burden of persuasion on all of the elements required for a stay).

² See Evans Transportation Co. v. Scullin Steel Co., 693 F.2d 715, 718 (7th Cir. 1982) (“There is a deceptive blandness about the word ‘stay,’ as if its issuance or denial were a routine housekeeping matter, unrelated to the substantial rights of the parties.”).

statutory provision in ICCTA at 49 U.S.C. § 10902 pursuant to which an existing Class II or Class III rail carrier may acquire rail lines, Congress affirmed the continued use of section 10901 for line acquisitions by a non-carrier. See H.R. Conf.Rep. No. 422, 104th Cong., 1st Sess. 180 (1995) (“By providing (in new section 10902) this clear delineation of requirements for Class II and Class III rail carriers acquiring rail lines, the Conference does not intend to limit the availability of section 10901 for non-carrier acquisitions.”).

Under ICCTA, the acquisition of rail lines by a non-carrier is governed by 49 U.S.C. § 10901, regardless of the number of involved sellers and regardless of whether the non-carrier is acquiring all or some of the lines of the sellers. See 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); CWRO Reply to UTU Petition for Stay at 6-7.

Alternatively, as set forth in the attached Verified Statement of Daniel P. Hennessy (“Hennessy V.S.”), the Board must recognize that CVRC and RTRC are operated as part of a single, interconnected rail system that is designed to provide intraplant switching and interchange service for the Cleveland Works steel facility. CVRC and RTRC are operated under common management and control. Hennessy V.S. at ¶ 2. CVRC and RTRC do not compete with each other for traffic. Id. at ¶ 4. Instead, they provide coordinated intraplant switching and interchange service for the same primary customer (Cleveland Works). Id. They provide this coordinated and integrated service using jointly owned trackage and other rail facilities. Id. at 5-6. They share rail equipment, office space and use the same personnel to supervise operations, financial and administrative functions. Id. at 7-10. The extent to which CVRC and RTRC share resources and coordinate their operations is a contributing factor to and further reflection of the integrated nature of their operations.

Although separate corporate subsidiaries of LTV Steel, CVRC and RTRC are 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 carrier operations under common management and control, carriers did not compete with each other, and carriers shared equipment and other facilities). Therefore, even assuming that UTU's interpretation of the Fox Valley decision is correct post-ICCTA, and that the acquisition of substantially all of the assets of two separate carriers requires control authority under 49 U.S.C. § 11323, the fact that CVRC/RTRC are a "single system" would make CWRO's use of the section 10901 exemption appropriate here.³

Request for Expedited Consideration

CWRO requests expedited consideration of UTU's Petition to Revoke and a decision issued and effective on or before May 13, 2002. For the reasons stated in CWRO's Reply to the Petition for Stay, ISG, ISG Cleveland Inc. (the owner/operator of the Cleveland Works steel plant) and CWRO are being substantially harmed by the Board's stay. CWRO Reply to UTU Pet. for Stay at 10-11. Most particularly, ISG is paying CVRC and RTRC \$15,493 per day to cover their operating losses. Id.

The Board now has CWRO's Reply to the Petition to Revoke, which provides further support for the argument made in its Reply to the Petition for Stay and adds pertinent facts for the record, but does not raise new issues. By May 13th, the Board will have had the UTU Petition to Revoke for more than a week and CWRO's argument in opposition for a week. CWRO submits that this is more than sufficient time for the Board to render a decision on the

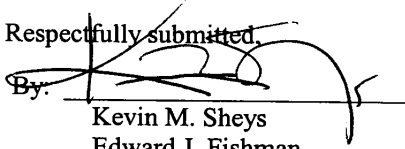
³ Even assuming the Board finds that 49 U.S.C. § 11323 governs this transaction, based on a finding that CVRC/RTRC are not a single system or based on some other rationale, UTU is not entitled to labor protection under 49 U.S.C. § 11326. See CWRO Reply to Pet. for Stay at 7. It is clear that UTU's real motive here is to delay this transaction.

merits. The Board should not facilitate UTU's effort to protract the closing of this transaction by further delaying the issuance of a decision in this matter.

Conclusion

For the foregoing reasons, CWRO respectfully requests that the Board promptly deny the petition to revoke filed by UTU in this proceeding.

Respectfully submitted,

By: 

Kevin M. Sheys

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1800 Massachusetts Avenue – 2nd Floor

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(202) 778-9000

Dated: May 8, 2002

**ATTORNEYS FOR ISG CLEVELAND
WORKS RAILWAY COMPANY**

Over the last several years, approximately ninety percent (90%) of the rail service provided by RTRC and nearly one hundred percent (100%) of the rail service provided by CVRC has been provided for LTV at Cleveland Works. Although RTRC provides rail service to one other customer (Sun Oil) located near the Cleveland Works facility, this service represented a very small portion of RTRC's activities.

5. CVRC owns trackage on and serves the steel facilities located on the west side of the Cuyahoga River. RTRC owns trackage on and serves the steel facilities located on the east side of the Cuyahoga River. In addition, CVRC and the RTRC jointly own certain trackage and other rail facilities that are used by both railroads. Specifically, CVRC and RTRC each own an undivided fifty percent (50%) interest in over ten miles of trackage (including but not limited to trackage in Seneca Yard and approximately 2.2 miles of railroad line that traverses the Cuyahoga River) that connects the CVRC and RTRC trackage. CVRC and RTRC both use the jointly owned trackage and other facilities in Seneca Yard to interchange traffic and otherwise coordinate operations. In addition, CVRC and RTRC each own an undivided fifty percent (50%) interest in three railroad bridges that form part of that jointly owned trackage. The CVRC and RTRC are jointly responsible for supervision, control and maintenance of the joint trackage. Norfolk Southern Railway Company ("NS") has trackage rights on the through route portion of that joint trackage. Under the NS trackage rights arrangement, CVRC and RTRC are required to coordinate their supervision, control and maintenance of the joint trackage and to jointly coordinate their operations with NS traffic. In addition to the jointly owned trackage and bridges, CVRC and RTRC both have the right to use spur, industrial and other non-regulated trackage within the boundaries of their respective sides of the steel plant that was owned by LTV.

6. CVRC and RTRC rail service to the Cleveland Works steel facility involves four general categories of product transported by rail: raw materials, hot metal, work-in-process and finished products. A significant portion of the rail service provided by CVRC and RTRC to the Cleveland Works involves transfers of such products between CVRC and RTRC in order to move product from steel plant facilities located on opposite sides of the Cuyahoga River. Hot metal is routinely transferred from RTRC to CVRC and is occasionally transferred from CVRC to RTRC because there is blast furnace capacity on both sides of the Cuyahoga River. Certain work-in-process material such as steel slabs and steel coils are produced on the east side and transferred from RTRC to CVRC for storage or processing on the west side. These transfers occur in the jointly owned Seneca Yard facility. These transfers require the two railroads to coordinate their operations and to coordinate their activities with Cleveland Works steel plant personnel as well.

7. Many of the activities of CVRC and RTRC are managed by the same personnel. For example, the same person (until a few days ago) served as General Superintendent of both CVRC and RTRC and was responsible for coordinating the operations of both railroads. Over the last several years, there were numerous other people who have been employed by one company to perform payroll, administrative or railroad supervisory services for both companies.

8. CVRC and RTRC share the same headquarters office at 3060 Eggers Avenue in Cleveland, Ohio. CVRC formerly leased this facility from LTV.

9. CVRC and RTRC both own and/or lease locomotives and other rail equipment. However, CVRC and RTRC have shared rail equipment when necessary to ensure the smooth and uninterrupted flow of rail service to Cleveland Works. For example, RTRC has leased some locomotives owned by CVRC. In addition, both railroads own different types of railroad cars

that are used by both railroads in their operations. For example, the CVRC owns coil cars that are used by both CVRC and RTRC.

10. The financial activities of CVRC and RTRC are integrated under common management and control. The capital expenditure budgets of CVRC and RTRC historically have been developed by the same managers at the same time and therefore reflect coordination and interdependence.

VERIFICATION

I, Daniel P. Hennessy, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to make this verified statement on behalf of CVRC and RTRC.


Daniel P. Hennessy

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **ISG Cleveland Works Railway Company's Reply to UTU Petition to Revoke** was served this 8th 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

A handwritten signature in black ink, appearing to read 'Edward J. Fishman', written over a horizontal line.

Edward J. Fishman