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August 31, 2005

BY HAND DELIVERY

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

ENTERED
Office of Proceedings

AUG 31 2005

Part of
Public Record

RE: *Evansville Western Railway, Inc.—Acquisition And Operation
Exemption—Paducah & Louisville Railway, Inc.
Finance Docket No. 34738 (Sub-No. 1)*

Dear Secretary Williams:

Enclosed herewith on behalf of Evansville Western Railway, Inc. ("EVWR") are an original and 11 copies of a Petition For Waiver of 49 C.F.R. § 1150.32(e) (EVWR-2). As can be seen from the certificate of service attached thereto, copies of this pleading are being served today on all parties of record indicated on the service list posted on the Board's website.

Please acknowledge the receipt and filing of this pleading by stamping the eleventh copy of the filing and returning that copy to the person delivering the filing for return to me. If there are any questions concerning this submission, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

William A. Mullins

cc: J. Thomas Garrett, Esq.
All Parties of Record

214629

EVWR-2

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34738 (Sub-No. 1)

EVANSVILLE WESTERN RAILWAY, INC.
—ACQUISITION AND OPERATION EXEMPTION—
PADUCAH & LOUISVILLE RAILWAY, INC.



PETITION FOR WAIVER OF 49 C.F.R. § 1150.32(e)

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August 31, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34738 (Sub-No. 1)

EVANSVILLE WESTERN RAILWAY, INC.
—ACQUISITION AND OPERATION EXEMPTION—
PADUCAH & LOUISVILLE RAILWAY, INC.

PETITION FOR WAIVER OF 49 C.F.R. § 1150.32(e)

Evansville Western Railway, Inc. ("EVWR"), a noncarrier, hereby petitions for waiver of the regulations of the Surface Transportation Board ("STB" or "Board") found at 49 C.F.R. §1150.32(e). This waiver requests relates to EVWR's Notice of Exemption ("Notice") in the above docket number whereby EVWR seeks an exemption to acquire from the Paducah & Louisville Railway, Inc. ("PAL"), by purchase of track and sublease of right-of-way, and to operate, approximately 124.5 miles of rail line between Evansville, IN, and Okawville, IL, including the Mt. Vernon Branch (the "Line"). Section 1150.32(e) requires posting of an employee notice, and certification to the Board of that posting, 60 days prior to EVWR's acquisition of the rail line from PAL. The waiver is justified because strict compliance with the regulation creates certain technical issues and because all of the unions representing all potentially-affected employees have been given ample notice of the transaction, including having been sent notice on August 3, nearly five months ahead of the requested closing date.

EVWR requests that the Board rule on this waiver request not later than October 21, 2005 so that if the request is denied, EVWR will have time to post notices and certify their posting to the Board at least 60 days in advance of the anticipated closing on its acquisition of the involved line.

DISCUSSION

As noted, in this proceeding EVWR seeks an exemption to acquire the Line from PAL. EVWR's exemption notice is related to PAL's minor application filed pursuant to 49 U.S.C. §11323 for PAL to purchase the Line and lease the real property from CSX Transportation, Inc. ("CSXT").¹ As noted in the application, upon PAL's acquisition of the Line, PAL will then immediately sell the Line to EVWR and assign its lease of the real property to EVWR.²

However, pursuant to Section 1150.32(e), before EVWR could acquire the Line from PAL, EVWR would have to post notice of the proposed EVWR transaction at the workplace of the employees on the affected line and give notice to the national offices of the labor unions representing the employees on the line. In this case, application of the strict requirements of this regulation is unnecessary for two basic reasons: (1) all potential employees affected by the EVWR/PAL transaction and their national unions already have notice of the transaction; and (2) technical compliance with the regulation would be impracticable as PAL will never actually have any employees who work on the Line and because EVWR, as a non-carrier, doesn't yet have any employees to which notice can be given.

The Board established the 60-day notice requirements embodied in Section 1150.32(e) to prevent rail employees from being forced to make complicated career decisions in the 7-day time frame of a Section 10901/10902 acquisition exemption.³ The Board also acknowledged,

¹ *Paducah & Louisville Railway, Inc.—Acquisition—CSX Transportation, Inc.*, Finance Docket No. 34738 (filed Aug. 3, 2005). The application was accepted for consideration by the Board in a decision served August 29, 2005.

² EVWR expects, in its first year of operation, to generate approximately \$12.5 million in gross rail operating revenue.

³ The purpose of the 60-day notice requirement established by the Board was to "assist employees who are confronted with major adjustments and decisions relating to their livelihoods" on as little as 7-days' notice. *Acquisition Of Rail Lines Under 49 U.S.C. 10901 And 10902 -- Advance Notice Of Proposed Transactions*, STB Ex Parte No. 562, 1997 STB LEXIS

however, that there could be circumstances in which those notice requirements would be waived if they were not needed.⁴ Because the CSXT-PAL application and EVWR Notice provide much more advance notice than would be required by 49 C.F.R. §1150.32(e) and thoroughly describe EVWR's planned hiring and operations, and because the CSXT-PAL transaction will be subject to *New York Dock* labor protection,⁵ the 60-day notice provisions of Section 1150.32(e) are unnecessary and should be waived.

PAL's application to acquire the Line from CSXT thoroughly explained the anticipated labor impacts of the proposed series of transactions. Specifically, the application stated:

Although created as a non-carrier subsidiary of PAL, EVWR is not being created to avoid PAL's collective bargaining agreements or to avoid union operations over the Line. Indeed, EVWR intends to become a fully unionized carrier and PAL and EVWR intend to enter into any necessary implementing agreements required to accomplish that purpose. EVWR expects to have any employees hired to operate and maintain the Line work under essentially the same agreements as if PAL were doing the work. As such, EVWR expects its employees to be represented by five unions; the same unions and crafts that would operate and maintain the Line if PAL had not sold the Line to EVWR.

Application at 5.⁶ Furthermore, the application stated:

343 (served Sept. 9, 1997) ("*Advance Notice*") at *17-*18, *aff'd sub nom. Association of American Railroads, et al. v. STB*, 161 F.3d 58 (D.C. Cir. 1998). "[E]mployees on the lines that have been sold are forced to make career choices -- such as whether they will accept employment on the new carrier or retain whatever rights they have to exercise seniority or later be reemployed on the seller's lines -- in a very short period of time," the Board said.

⁴ *Advance Notice* at *21.

⁵ The CSXT-PAL application stipulates that the CSXT-PAL sale and lease would be subject to the labor protective provisions of *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), as modified by *Wilmington Term. RR, Inc.—Pur. & Lease—CSX Transp., Inc.*, 6 I.C.C.2d 799, 814-826 (1990), *aff'd sub nom. Railway Labor Executives' Ass'n v. I.C.C.*, 930 F.2d 511 (6th Cir. 1991) ("*New York Dock*"). See CSXT-PAL application at 14.

⁶ See also EVWR's Notice at 3 ("EVWR contemplates that, to the extent that EVWR has employees that perform the same or similar functions as the crafts or classes of PAL employees, EVWR's employees will also be represented by these labor organizations, and EVWR will be party to collective bargaining agreements to be negotiated with such organizations.")

EVWR will be headquartered on the Line, will hire qualified existing employees now working on the Line, and will have local management and local personnel.

....

EVWR expects to have its own employees. EVWR plans to utilize three management and 19 non-management employees. EVWR plans to have five locomotive engineers, five trainmen, five maintenance-of-way employees, two signal and communication employees, and two mechanical employees.

Application at 7 and 9. *See also* EVWR's Notice at 3. The application also described EVWR's operating plan for the line, and Appendix 1 to the CSXT-PAL application stated the anticipated impacts, by position, on CSXT and EVWR employment. *Id.*, at 30-33. On August 3, 2005, copies of that application and EVWR's Notice were served on 20 Presidents and General Chairmen of rail labor organizations representing all employees currently working on either the CSXT line or on PAL.

Because all potentially impacted employees on either the CSXT or PAL received full knowledge of the impacts of the various transactions on August 3rd or shortly thereafter and the transaction contemplated by EVWR's Notice can only occur if the simultaneously-filed CSXT-PAL application is granted by the Board, the time frames for processing EVWR's Notice are much longer than those that inspired the notice requirement contained in Section 1150.32(e). Indeed, CSXT and PAL have asked the Board to issue a ruling on their application that allows closing the transaction by year's end. The nearly 150-day period from the August 3 filing of EVWR's Notice until the requested year's end closing date is far longer than the 7-day effective periods of the class exemption procedures that inspired the Section 1150.32(e) requirement, and is well over twice as long as the notice that Section 1150.32(e) requires. Thus, employees on the affected line have even more notice than required by Section 1150.32(e).

The labor protection provisions applicable to the CSXT-PAL transaction also differentiate EVWR's Notice from the typical 7-day acquisition exemption that was the premise

of Section 1150.32(e). In *Advance Notice*, the Board found union arguments for a 60-day notice “especially [compelling] since employees are not accorded any statutory protection from the effects of the transaction except where the purchase is by a Class II carrier.” Here, that is not the case. Instead, CSXT and PAL have stipulated that employees impacted by CSXT’s sale of the line to PAL are entitled to *New York Dock* protection, the highest level of standard labor protection accorded by the Board. In *Advance Notice*, the Board pointed out that *New York Dock* rights were far more extensive than the newly-created 60-day notice requirements. See *Advance Notice* at *15. Thus, employees affected by these transactions are more protected from employment impacts than in a typical Section 10901 exemption.

There are also technical reasons for waiving the Section 1150.32(e) requirement. For example, the employees of EVWR’s seller - PAL – will not be impacted by the EVWR purchase because none will have ever worked on the Line. Therefore, posting notices on the “seller’s” property, as called for by the rule, is meaningless. Likewise, as a newly created non-carrier, EVWR has no employees for which notice would even be relevant. EVWR will not have any employees until such time as it acquires the Line and hires the relevant employees as noted in the application. Additionally, because the CSXT-PAL transaction is separate from the PAL-EVWR transaction, with the former being subject to *New York Dock* labor protection, if EVWR posted notices on CSXT’s property,⁷ it could create significant confusion among CSXT’s employees about the protections to which they are entitled.

These technical reasons, however, are not the principal reasons for granting the waiver. Rather, the employees on the Line already have, through their labor organizations and through

⁷ Assuming, *arguendo*, that EVWR, which itself currently has no contract with CSXT, had authority to enter CSXT’s property and post notices there.

the information contained in EVWR's Notice and in the CSXT-PAL application, more extensive information on these transactions,⁸ and a longer lead time to act on it, than they would under the 60-day notice rule. Accordingly, the duplicative notice that would be required by Section 1150.32(e) is unnecessary.

As the Board indicated in *Advance Notice*, there are circumstances in which the notice requirements of Section 1150.32(e) and related provisions may not be needed and could be waived. The Board there cited as examples two cases, *Wisconsin Central Ltd. -- Acquisition Exemption -- Lines of Union Pacific Railroad Company*, STB Finance Docket No. 33116 (STB served Apr. 17, 1997), and *Wisconsin Central Ltd. -- Acquisition Exemption -- Tomahawk Railway, Limited Partnership*, STB Finance Docket No. 33358 (STB served July 16, 1997), in which four to six months' advance notice to employees of a transaction would have been sufficient to justify a waiver. *Advance Notice* at *21. Indeed, the Board has subsequently waived requirements created in *Advance Notice* in a variety of circumstances. See *Wheeling & Lake Erie Railway Company-Acquisition and Operation Exemption-CSX Transportation, Inc.*, STB Finance Docket No. 34341 (served Sept. 2, 2003); *The Canadian American Railroad Company—Acquisition and Operation Exemption—Green Mountain Railroad Corporation*, STB Finance Docket No. 33934 (served Oct. 10, 2000); *Portland & Western Railroad, Inc.—Lease and Operation Exemption—Port of Tillamook Bay Railroad*, STB Finance Docket No. 33734 (served May 10, 1999). As in those proceedings, a waiver is likewise appropriate in this case.

⁸ The Board's regulations require only that Section 1150.32(e) notices contain, "the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred." This information is already available in the CSXT-PAL application and the related notices of exemption. Furthermore, the Board has now accepted that application as fully complying with the Board's regulations and given notice to the public of its intent to proceed with the application, further establishing the adequacy of the disclosure of labor impacts from the proposed transactions.

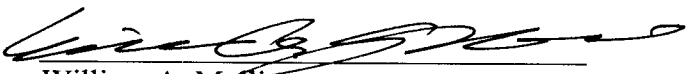
CONCLUSION

Waiver of the Section 1150.32(e) notice provisions applicable to EVWR's acquisition of the Line by purchase and assignment of a lease from PAL is appropriate because the filings in this proceeding and the related application and exemption provide the employees nearly 5 months' actual notice of the transactions, and a clear description of EVWR's hiring and operating plans. Moreover, the employees currently working on the line who are potentially affected will be protected by the *New York Dock* provisions applicable to the CSXT-PAL transaction. Together, the information provided and the *New York Dock* protections provide potentially-affected employees much more than a Section 1150.32(e) notice would provide. Finally, due to the structure of the various transactions, posting Section 1150.32(e) notices would basically be meaningless and could well confuse CSXT employees who currently work on the line.

For all of the foregoing reasons, EVWR submits that the requirements of Section 1150.32(e) should be waived in these particular circumstances. EVWR requests that the Board act on this request by October 21.

Respectfully submitted,

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Attorneys for Evansville Western Railway, Inc.

Dated: August 31, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2005, a copy of the foregoing petition has been served on all parties of record to this proceeding listed on the Surface Transportation Board's website by first class mail, postage prepaid.

A handwritten signature in black ink, appearing to read "David C. Reeves", written over a horizontal line.

David C. Reeves
Attorney for Evansville Western
Railway, Inc.