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November 27, 2007

Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423



Re. Finance Docket No. 35099
Maryland Midland Railway, Inc. – Acquisition and Operating Exemption
– Certain Assets of the Maryland Transit Administration

Dear Secretary Williams:

On behalf of Maryland Midland Railway, Inc. ("MMID") enclosed for filing in the above-referenced docket please find an original and ten copies of MMID's reply in opposition to the petition for a stay filed by the Maryland Transit Administration.

Also enclosed is an additional copy of this letter and the reply. Please receipt-stamp these documents and return them to our messenger. Please feel free to contact me with any questions you may have.

Thank you for your assistance

Very truly yours,


Martin Schaefermeier

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35099

MARYLAND MIDLAND RAILWAY, INC.
- ACQUISITION AND OPERATION EXEMPTION -
CERTAIN ASSETS OF THE MARYLAND TRANSIT ADMINISTRATION



REPLY OF MARYLAND MIDLAND RAILWAY, INC
IN OPPOSITION TO PETITION FOR STAY BY
MARYLAND TRANSIT ADMINISTRATION

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Dated: November 27, 2007

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SURFACE TRANSPORTATION BOARD

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MARYLAND MIDLAND RAILWAY, INC.
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IN OPPOSITION TO PETITION FOR STAY BY
MARYLAND TRANSIT ADMINISTRATION

Pursuant to 49 CFR § 1104.13, Maryland Midland Railway, Inc. (“MMID”), by its counsel, hereby files this reply in opposition to the petition for a stay filed by the Maryland Transit Administration (the “MTA”).

Introduction

The MTA seeks to delay the consummation of the proposed acquisition of MMID by Genesee & Wyoming Inc. (“GWI”). For the reasons set forth below, the MTA’s petition for a stay is without foundation. Accordingly, MMID respectfully requests that the Surface Transportation Board (the “Board”) deny the petition.

First, the MTA has misstated the facts. The petition creates the impression that the major reason why the MTA has acted is because there is a defect in the deed for real estate that the MTA sold to MMID almost two years ago that is in danger of going uncorrected if the proposed sale of MMID to GWI is consummated. What the MTA fails to mention is that, long before the MTA filed its petition, both MMID and GWI had unconditionally agreed to change the deed so that it reads exactly as the MTA wants it to read. Consistent with that agreement, the notice of exemption that MMID filed in this very proceeding describes the real estate exactly as the MTA

says it should be described. Finally, even if there were a dispute about the deed – and there is not – the consummation of the proposed transaction would in no way prejudice the MTA's ability to obtain reformation. The deed is a red herring that provides no support whatsoever for the MTA's petition for a stay.

Second, once the issue of the deed is set aside, the MTA's petition is supported by nothing except a conclusory assertion that the MTA and other State officials "are conducting an investigation into the legitimacy of the transaction between the MTA and MMID." The petition does not explain what the basis for this "investigation" might be, why this "investigation" is being commenced now, on the eve of the consummation of the proposed acquisition of MMID by GWI, even though the real estate transaction occurred almost two years ago, or how such an "investigation" could possibly be prejudiced by the consummation of the proposed transaction. The failure of the MTA to address these questions is not surprising, since (a) the real estate was sold to MMID at the suggestion of the MTA and at a price proposed by the MTA; (b) the sale of the real estate to MMID was approved by the Board of Public Works of the State of Maryland after the Maryland Department of Transportation ("MDOT") commissioned a report from an outside consultant which explained in detail why the sale would be beneficial to the State of Maryland and its citizens; and (c) the proposed acquisition of MMID by GWI would in no way prejudice any investigation which the MTA might wish to conduct, since the proposed transaction simply substitutes GWI for the current stockholders of MMID and otherwise does not affect the corporate existence of MMID or its ability to respond to any issues the MTA might raise.

Third, when the MTA asserts that no one would be harmed by a stay, the MTA overlooks the most pertinent constituency, which would indeed be severely prejudiced by any delay in the

consummation of the proposed transaction. That constituency is the present stockholders of MMID. The proposed transaction presents them with an opportunity to receive \$29 million for their stock, but under certain circumstances GWI has the right not to close the transaction if an event has occurred that has had a "material adverse effect" on MMID's business. Every day that the closing is delayed is another day during which something unexpected could happen that might have a material adverse impact on MMID's business and give GWI an excuse to walk away from the transaction if it chooses to do so. The court in the United States that has the greatest familiarity with speculative attempts to delay the closings of proposed sales of companies – the Delaware Chancery Court – has repeatedly recognized that the risk of non-consummation arising from delay, by itself, is a sufficient reason to deny an injunction in all but the most compelling of cases.

Finally, the MTA's assertion that the "public interest" would be served by staying this proceeding cannot withstand scrutiny. To the contrary, the Board has repeatedly recognized that it is not appropriate for its proceedings to become entangled in contractual disputes between private parties. While the MTA is a public regulator in some contexts, in this context it is nothing more than a seller of real estate. No "public interest" would be served by allowing the MTA to delay this public proceeding in order to pursue whatever private dispute it believes it may have with MMID.

Legal Standard

A party seeking a stay must establish that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. *Western New York & Pennsylvania Railroad, LLC*, STB Finance Docket No. 35019, at *2 (Service Date August 6, 2007) (citing *Hilton v Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro Area Transit Comm'n v Holiday Tours, Inc*, 559 F.2d 841, 843 (D.C. Cir 1977); *Virginia Petroleum Jobbers Ass'n v. Fed Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir 1958)) “[I]t is the movant’s obligation to justify the . . . exercise of such an extraordinary remedy.” *Id.* (quoting *Cuomo v NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985)). As the party seeking the stay, the MTA must “carry the burden of persuasion on all of the elements required for such extraordinary relief.” *Id.* As explained below, however, the MTA fails to demonstrate the existence of any one of these factors

Argument

I. The MTA Has No Chance of Success on the Merits.

As explained above, the first thing that the MTA must demonstrate is that “there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed.” In its petition, the MTA never really addresses this factor, since it argues that it is likely to prevail, not on the merits of any challenge to this action, but on the merits of certain unspecified claims that it says it will assert in state court if the stay is denied here. See Petition for Stay at page 6. The likelihood that the MTA will prevail in some hypothetical action in state court is not the issue. The issue is whether the MTA is likely to prevail on “any challenge to the

action sought to be stayed.” In any event, far from there being “a strong likelihood” that the MTA will prevail in its hypothetical state court proceeding, in fact there is no reason to think that the MTA will ever have a good faith basis for commencing such an action.

In its petition, the MTA devotes a single sentence to explaining why it is likely to prevail. See Petition for Stay at page 7. Specifically, it says that a “fair ground for litigation” exists because of “the issues related to the deed, or any other issues that might be disclosed by the ongoing investigation.” *Id.*¹ As has already been explained, however, there simply are no “issues related to the deed.” MMID and GWI have both agreed that the deed describes more real property than the parties meant to convey, MMID and GWI have both informed the MTA that they will reform the deed as the MTA desires, and the notice of exemption that MMID filed in this very proceeding describes the real property exactly as the MTA wants it described.

Once the red herring of the deed is disregarded, all that supports the MTA’s petition is the unexplained reference to “any other issues that might be disclosed by the ongoing investigation.” The petition is devoid, however, of any basis for believing that there will be such issues. No wrongdoing is alleged. There is no explanation of what the MTA is investigating,

¹ The MTA points out that the D.C. Circuit has held that the degree of likely success on the merits that is required in order for a court to issue a stay to issue varies depending on the circumstances. Traditionally, the requirement articulated was that the petitioner be “likely to prevail on the merits.” See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (quoting *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Where the balance of hardships tips “decidedly” or “sharply” toward the petitioner, however, it is enough if the petitioner raises a “serious legal question.” *Id.* at 844 (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953), and *Charlie’s Girls, Inc. v. Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973)). Even where the requirement has been reduced so that the petitioner only needs to raise a “serious legal question,” however, it is still necessary that the petitioner raise issues “going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation.” *Id.* (quoting *Hamilton Watch*). Here, as explained below, the balance of hardships, far from tipping “decidedly” or “sharply” in the MTA’s favor, tips overwhelmingly against the MTA. See Subsections II and III. As a result, even if *Holiday Tours* governed here, it would not be enough for the MTA merely to raise a “serious legal question.” Even if that were the test, however, the MTA has not carried that burden because the MTA has failed to raise issues “going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation.”

what prompted the investigation, when the investigation will be concluded what the MTA suspects, or why it took the better part of two years for the MTA to commence the investigation.

Given the circumstances surrounding the sale, it is not surprising that the MVA fails to elaborate on the “other issues that might be disclosed.” As mentioned earlier, the real estate was sold to MMID at the suggestion of the MTA and at a price proposed by the MTA, and the sale of the real estate to MMID was approved by the Board of Public Works of the State of Maryland after MDOT commissioned a report from an outside consultant which explained in detail why the sale would be beneficial to the State of Maryland and its citizens. There is no basis for believing that the MTA would now prevail in any proceeding challenging the sale.

II The MTA Is Threatened with No Irreparable Harm

The “party moving for a stay is required to demonstrate that the injury claimed is ‘both certain and great.’” *Cuomo*, 772 F.2d at 976 (quoting *Wisconsin Gas Co v FERC*, 758 F.2d 669, 674 (D.C. Cir 1985). Yet, here, the MTA’s assertion that it is threatened with irreparable harm cannot withstand analysis. The proposed transaction is not a sale of the assets of MMID. It is a sale of the stock of MMID from the current stockholders to GWI. The transaction does not affect the assets or obligations of MMID at all. If there was a dispute about the deed – and there is not – the MTA would be just as able to obtain reformation of the deed from MMID after the transaction as before the transaction. If the “investigation” had any basis – and it does not – the MTA would be just as able to obtain a remedy from MMID after the transaction as before the transaction

III. A Stay Would Prejudice the Stockholders of MMID.

In its petition, the MTA never mentions the constituency most threatened by harm if the MTA were to succeed in delaying the transaction. That constituency is the current stockholders

of MMID. Those stockholders stand to receive \$29 million from GWI when the transaction closes.² The agreement and plan of merger provides that, if the representations that MMID made about its financial condition at the time the agreement was signed are no longer true at closing, and if the change has had a “material adverse effect” on MMID’s business, GWI has the option of terminating the agreement and not consummating the transaction. For this reason, as in virtually any M&A transaction, any delay threatens the selling stockholders with significant harm. Every day that the closing is delayed is another day that something, presently unseen, could happen that might give GWI the option not to consummate the transaction.

More than any other court in the United States, the Delaware Chancery Court is frequently asked to grant injunctions that would delay the consummation of the sale of the company. Yet, that court regularly holds that the risk of non-consummation that results from delay, by itself, compels the denial of an injunction in all but the most compelling circumstances. *See, e.g., In re Wheelabrator Technologies, Inc. Stockholders Litigation*, 1990 WL 131351, at *9 (Del. Ch. September 6, 1990); *Braunschweiler v. American Home Shield Corp.*, 1989 WL 128571, at *7 (Del. Ch. October 26, 1989).³ As Chancellor Allen observed in *Solash v. Telex Corporation*, where the plaintiff was “exhorting” him to delay the consummation of the sale of a company:

² The proposed transaction attributes a total value of \$32 million to MMID, but one of its stockholders has chosen not to sell its stock to GWI, but rather to roll its equity interest into the new GWI subsidiary that will result from the transaction.

³ MMID is a Maryland corporation. The risk of non-consummation that results from delay has also routinely led the Maryland courts to deny injunctions in situations similar to this one. *See, e.g., Jusmover v. The Rouse Co.*, 2004 WL 3135516 (Circuit Court for Howard County, Maryland, November 4, 2004), *Hudson v. Prime Retail, Inc.*, 2004 WL 1982383 (Circuit Court for Baltimore City, Maryland, April 1, 2004). *Cf. Foster v. The Town and Country Trust*, Case No. 24-C-06-1442 (Circuit Court for Baltimore City, Maryland, February 24, 2006) (published by the court on the Website of the Maryland Business and Technology Case Management Program) (denying the plaintiff’s motion for expedited discovery and granting the defendants’ motion to dismiss).

[T]he balance of harms in this situation in which there is no alternative transaction and issuance of the injunction inescapably involves a risk that the shareholders will lose the opportunity to cash in their investment at a substantial premium requires not only a special conviction about the strength of the legal claim asserted, but also a strong sense that the risks in granting the preliminary relief of an untoward financial result from the stockholders' point of view is small. . . . At least on facts such as these, a due respect for the interest of the [selling stockholders] requires, in my judgment, that this invitation be declined.

1988 WL 3587, at *13 (Del. Ch. January 19, 1988). The Board should likewise decline the petitioner's invitation to run the risk that the stockholders of MMID may lose this opportunity forever.

IV. A Stay Would Serve No Public Interest.

No public interest would be served by allowing the MTA to delay this proceeding to pursue whatever private dispute it may believe it has with MMID. The Board has repeatedly recognized that the Board is not the proper forum for resolving such private disputes:

[W]hether SBS should be responsible for maintaining or indemnifying that portion of the line is a private contractual dispute subject to the terms of the agreement under which CSXT has made the assignment. The Board is not the proper forum to resolve such a dispute. Rather, contractual disputes such as this one are properly for the courts to decide.

Saginaw Bay Southern Railway Company, STB Finance Docket No. 34729, at *3 (Service Date May 5, 2006). *See also Morristown & Erie Railway, Inc.*, STB Finance Docket No. 34054, at **7-8 (Service Date June 22, 2004) (“[W]hether the County had any legal obligation to the municipalities is a private contractual dispute and the Board is not the proper forum to resolve that dispute. Rather, contractual disputes belong in court.”). While the MTA in some circumstances is a public entity with regulatory powers, in this instance it is nothing but a seller of real estate. For the same reasons that the Board refused to become embroiled in the disputes

described in the cases just cited, it should refuse to become embroiled in this private dispute as well.

Conclusion

For all of the reasons set forth above, the MTA has failed to demonstrate that it is entitled to the "extraordinary remedy" it seeks, and the Board should deny the MTA's petition for stay.

Respectfully submitted,



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MIDLAND RAILWAY, INC.**

Dated: November 27, 2007

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of Maryland Midland Railway, Inc. in Opposition to Petition for Stay by Maryland Transit Administration was served on the following party by first class mail, postage prepaid, on this 27th day of November, 2007:

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