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May 2, 2002

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001
(202) 565-1519



Re: Finance Docket No. 34182

Dear Mr. Williams:

Please find enclosed the original and ten (10) copies United Transportation Union's Petition for a Stay/Petition to Revoke to be filed in the above-captioned matter. Also, in accordance with prior Board orders, we have also enclosed a diskette in WordPerfect format.

Thank you for your cooperation.

FILED

FEE RECEIVED

MAY - 3 2002

**SURFACE
TRANSPORTATION BOARD**

Enclosures

Sincerely,

MAY 3 2002

Daniel R. Elliott, III
Associate General Counsel

**SURFACE
TRANSPORTATION BOARD**

cc: C. J. Miller, III, General Counsel
D. J. Schuler, General Chairperson

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Office of the Secretary
MAY 03 2002
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Public Record**

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34182



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

FILED

MAY 3 2002

UNITED TRANSPORTATION UNION'S SURFACE
PETITION FOR A STAY/PETITION TO REVOKE TRANSPORTATION BOARD

United Transportation Union ("UTU") respectfully petitions the Surface Transportation Board ("Board") to revoke the exemption for lack of jurisdiction, because the applicant, ISG Cleveland Works Railway Company ("CWRO"), has improperly sought authority for this transaction. CWRO requests exemption authority from the prior approval requirements of 49 U.S.C. § 10901, pursuant to 49 C.F.R. § 1150.31 *et seq.*, to acquire two carriers, Cuyahoga Valley Railway Company ("CVRC") and River Terminal Railway Company ("RTRC"). However, this transaction is clearly governed by 49 U.S.C. § 11323 as the Board (Interstate Commerce Commission ("ICC") at the time) has determined in the past. *See Fox Valley & Western Ltd. - Exemption, Acquisition and Operation*, 9 ICC 2d 209 (1992), *aff'd*, *Fox Valley & W. v. ICC*, 15 F.3d 641 (7th Cir. 1994) (hereinafter "*Fox Valley*"). Since the exemption automatically becomes effective in seven days from the April 29, 2002 filing date of the notice herein, UTU also moves for a stay of this transaction in the event the Board would not be able to make a decision on this petition to revoke prior to this May 6, 2002 date, which understandably would be difficult considering the short time frame.

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I. The Exemption Must Be Revoked For Lack Of Jurisdiction Since CWRO Is A Non-Carrier Acquiring Control of Two Rail Carriers.

49 U.S.C. § 11323 provides in pertinent part as follows:

(a) The following transactions involving rail carriers providing transportation subject to the jurisdiction of the Board under this part may be carried out only with the approval and authorization of the Board:

* * *

(4) Acquisition of control of at least 2 rail carriers by a person that is not a rail carrier.

Here, CWRO, a non-carrier, is acquiring control of CVRC and RTRC, two rail carriers, a transaction which is clearly governed by this provision.

UTU assumes that CWRO will argue in response that it is acquiring rail lines, which should fit under the § 10901 authority provision. However, the ICC has previously rejected this same argument in nearly identical circumstances in *Fox Valley*. In that case, Fox Valley, a non-carrier, filed a notice of exemption under 49 C.F.R. § 1150.35 to acquire substantially all of the assets of the Fox River Valley Railroad and the Green Bay and Western Railroad, both rail common carriers. *See Fox Valley*, 9 ICC 2d 209. Based on these facts, the ICC concluded that the transaction was governed by the provisions of § 11343(a)(4) (recodified at § 11323 (a)(4)), rather than § 10901. *Id.* This decision by the ICC was affirmed by the Court of Appeals for the Seventh Circuit. *See Fox Valley & W.*, 15 F.3d 641.

Based on *Fox Valley* and the statutory language at issue here, CWRO clearly has sought authority for this transaction under the wrong statute, and its exemption should be revoked for lack of jurisdiction.

II. The Board Should Stay the Effective Date Of the Exemption Pending a Decision on the Merits of UTU's Petition to Revoke.

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. HolidayTours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

As discussed in Section I of this petition, there is a strong likelihood that UTU will prevail on the merits.¹ 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. Moreover, where it appears that the moving party will ultimately succeed on the merits, a showing of irreparable harm in as satisfactory a manner as is generally desirable is not necessary for a stay to issue. *See Kaiser Trading Company v. Associated Metals and Minerals Corp.*, 321 F.Supp. 923, 934 (N.D. Cal. 1970). Third, the CWRO will not be harmed since it does not appear that the new railroad operation will begin until June 1, 2002. Moreover, in this instance, any harm to CWRO will be self-inflicted since it appears to have improperly filed at the Board. Finally, public interest supports granting the stay since the statutory scheme should be adhered to ensure the proper review of these types of transactions.

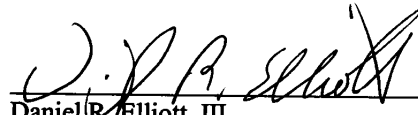
¹UTU also argues here alternatively on the merits that CWRO has not complied with the 60-day notice requirements set forth in 49 C.F.R. § 1150.32(e). While WLR Acquisition Corp. filed a notice, CWRO has not filed any notice. The regulation clearly requires the "applicant" to serve notice, which has not been done by CWRO. As a result, this transaction should not be allowed to proceed for at least 60 days from the date of a CWRO notice.

Based on these facts, the granting of a stay is called for here in the event a decision on the merits cannot be reached prior to the effective date of the exemption.

CONCLUSION

Based on the foregoing discussion, the petition to revoke or alternatively for a stay should be granted.

Respectfully submitted,

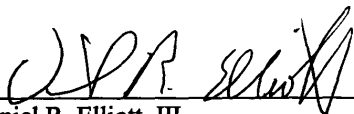
A handwritten signature in black ink, appearing to read "D. R. Elliott, III", is written over a horizontal line.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing United Transportation Union's Petition for a Stay/Petition to Revoke has been served this 2nd day of May, 2002 via UPS Next Day Air mail upon the following:

Kevin M. Sheys
Edward J. Fishman
Tracie D. Spear
Kirkpatrick & Lockhart LLP
1800 Massachusetts Avenue, 2nd Floor
Washington, DC 20036
(202) 778-9000



Daniel R. Elliott, III