

205606

ZWERDLING, PAUL, LEIBIG, KAHN & WOLLY, P.C.

1025 CONNECTICUT AVENUE, N.W.

SUITE 712

WASHINGTON, D.C. 20036-5420

(202) 857-5000

FAX: (202) 223-8417

ABRAHAM L. ZWERDLING (1914-1987)

1421 PRINCE STREET, SUITE 400-A
ALEXANDRIA, VA 22314

(703) 299-4371

FAX: (703) 299-4375

ROBERT E. PAUL*#
MICHAEL T. LEIBIG*#
WENDY L. KAHN*#
MICHAEL S. WOLLY*#
CARLA MARKIM SIEGEL*#

MARGO PAVE*#

*DC #MD +VA #NY

FILED

JUN 13 2002

**SURFACE
TRANSPORTATION BOARD**
June 13, 2002

Surface Transportation Board
Office of the Secretary
Case Control Unit
1925 K Street, NW
Washington, DC 20423-0001



Re: Finance Docket 34177 - IOWA, CHICAGO & EASTERN RAILROAD
CORPORATION - ACQUISITION AND OPERATION EXEMPTION - LINES OF
I&M RAIL LINK, LLC

Dear Mr. Williams:

Enclosed for filing are and original and 10 copies of the following pleadings as well as an electronic copy of each on 3.5" disk in WordPerfect format:

- Petition of Cooperating Labor Organizations to Revoke Exemption
- Petition of Cooperating Labor Organizations to Stay Transaction

A check in the amount of \$150 to cover the filing fee for the Petition to Revoke Exemption also is enclosed. Thank you.

**ENTERED
Office of the Secretary**

JUN 13 2002

**Part of
Public Record**

Sincerely,

Michael S. Wolly
Michael S. Wolly

Enclosures

cc w/ encls.: William C. Sippel, David Neigus, Donald Griffin, Harold Ross, Mitchell Kraus,
William Phillips

FEE RECEIVED

JUN 13 2002

**SURFACE
TRANSPORTATION BOARD**

205606

CLO-1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34177

**IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
-- ACQUISITION AND OPERATION EXEMPTION --
LINES OF I&M RAIL LINK, LLC**



**PETITION OF COOPERATING LABOR ORGANIZATIONS
TO STAY TRANSACTION**

**David Neigus, Esq.
International Association of Machinists
9000 Machinists Place
Upper Marlboro, MD 20772
(301) 967-4510**

**Mitchell Kraus, Esq., General Counsel
Chris Tully, Esq., Asst. General Counsel
Transportation Communications
International Union
3 Research Place
Rockville, MD 20850
(301) 948-4910**

**Donald Griffin, Esq.
Assistant General Counsel
Brotherhood of Maintenance of
Way Employees
10 G Street, N.E., Suite 460
Washington, D.C. 20002
(202) 638-2135**

**Michael S. Wolly, Esq.
Zwerdling, Paul, Leibig, Kahn & Wolly
(For Intl. Broth. of Electrical Workers)
Suite 712
1025 Connecticut Ave. NW
Washington, D.C. 20036
(202) 857-5000**

**Harold A. Ross, Esq.
Ross & Kraushaar
(For Broth. of Locomotive Engineers)
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1702
(216) 861-1313**

**William L. Phillips, Esq.
General Counsel
Brotherhood of Railroad Signalmen
601 West Golf Road
Box U
Mount Prospect, IL 60056
(847) 439-3732**

Counsel for Cooperating Labor Organizations

Date: June 13, 2002

**ENTERED
Office of the Secretary**

JUN 13 2002

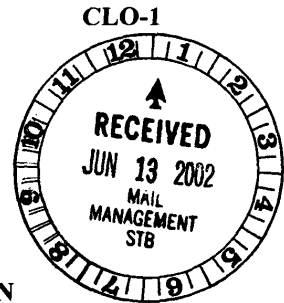
**Part of
Public Record**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34177

**IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
-- ACQUISITION AND OPERATION EXEMPTION --
LINES OF I&M RAIL LINK, LLC**

**PETITION OF COOPERATING LABOR ORGANIZATIONS
TO STAY TRANSACTION**



Now come the Brotherhood of Locomotive Engineers ("BLE"), the Brotherhood of Maintenance of Way Employees ("BMWE"), the Brotherhood of Railroad Signalmen ("BRS"), the International Association of Machinists ("IAM"), the International Brotherhood of Electrical Workers ("IBEW"), and the Transportation Communications International Union ("TCIU") (hereinafter collectively referred to as the "Cooperating Labor Organizations"), and state that they are national railroad unions under the Railway Labor Act, 45 U.S.C. §§151 et seq., and the duly designated and authorized collective bargaining representatives for all of the union represented crafts or classes of employees of the I&M Rail Link, LLC ("IMRL"). On behalf of such employees, the Cooperating Labor Organizations hereby request the Surface Transportation Board issue an order, pursuant to 49 C.F.R. §1150.35(f), staying the instant transaction in order to provide adequate time for interested persons to comment and participate in the proceedings and to allow the Cooperating Labor Organizations sufficient time to conduct necessary discovery

pursuant to 49 C.F.R. §1121.2, in light of the regional and national transportation importance of the transaction and its impacts upon employees, communities and shippers.

The transaction is not fully and accurately set forth in the Notice. While the Notice makes it appear that the transaction is a non-carrier's acquisition of railroad assets, the transaction is, in fact, an acquisition of the IMRL by the Dakota, Minnesota and Eastern Railroad ("DM&E") with both under the same management control. That transaction is subject to Board jurisdiction under 49 U.S.C. §11323(a)(3), not 49 U.S.C. §10901 as alleged in the notice. While we submit that, as a matter of law, this transaction cannot be subject to Section 10901, we also believe that the evidence obtained during discovery by the Cooperating Labor Organizations will support the aforescribed conclusions: the Applicant's use of the class exemption under 49 C.F.R. §1150 is unlawful and the Board must dismiss the notice and direct the Applicant to re-file under 49 U.S.C. §11323 for a transaction involving the DM&E's acquisition of IMRL. Clearly the Board will then have to consider the potential market impacts, operational changes and environmental effects posed by that transaction in order to comply with the requirements imposed upon it under 49 U.S.C. §10101.

ARGUMENT

I. THE STANDARDS FOR A STAY

The Board applies the standards set forth in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) when evaluating a petition for stay. Finance Docket No. 33429, Burlington Northern Santa Fe Ry. v. American Train Dispatchers Dept., Bhd. of Locomotive Engineers, slip. op. at 2, served July 18, 1997 (not published). To obtain a stay, the petitioner must show that: (1) it is likely to prevail on the merits

of its petition; (2) it will suffer irreparable injury in the absence of a stay; (3) issuance of a stay will not harm other parties interested in the proceeding; and (4) the public interest favors a stay. Holiday Tours, 559 F.2d at 843. However, if the petitioner presents a case in which the latter three factors “strongly favor interim relief,” the Board may issue a stay so long as the petitioner “has made a substantial case on the merits.” Id. This is so because the stay sought by the Cooperating Labor Organizations is preventative in that it seeks to maintain the status quo pending the Board’s consideration of the petition to revoke pursuant to the procedures contained at 49 C.F.R. 1121. Id. at 844. We respectfully submit we meet the four prongs of the Holiday Tours test.

II. THE COOPERATING LABOR ORGANIZATIONS HAVE MET THEIR BURDEN AND MERIT THE RELIEF SOUGHT IN THIS PETITION

First, as set forth in greater detail in the Petition to Revoke, and by this reference incorporated herein, the Cooperating Labor Organizations submit the transaction proposed in the Verified Notice cannot be effected under Section 10901. The transaction concerns the acquisition of all of the rail assets of IMRL which is, for regulatory purposes, the acquisition of an entire rail carrier. The IC&E is controlled by the DM&E indirectly through a non-carrier subsidiary of DM&E, Cedar American Rail Holdings, Inc. Under the decision in U.S. v. Marshall Transport, 322 U.S. 21 (1944) and its progeny, the Board must apply the “real party in interest” doctrine and require DM&E to join in the acquisition transaction. Because DM&E is a carrier and the transaction involves the acquisition of another carrier, the IMRL, the transaction must come under Board jurisdiction pursuant to Section 11323(a)(3).

Second, the members of the Cooperating Labor Organizations will suffer irreparable injury in the absence of a stay. Under the Board's procedures applicable to class exemptions involving the acquisition of a Class 2 carrier, a party may consummate the proposed transaction 21 days after filing a verified notice of exemption. 49 C.F.R. §1150.35(e). Under 49 U.S.C. §10901 and the class exemptions arising thereunder, no employee protective conditions can be imposed by the Board as a matter of law, regardless of any exceptional circumstances involving the affected employees. Therefore, the employees affected by the transaction receive only those benefits available to them under collective bargaining agreements. The Cooperating Labor Organizations submit that none of the collective bargaining agreements applicable to IMRL employees offers any benefits to the employees affected by this transaction. Therefore, the IMRL employees will be rendered jobless by the sale of their employer and their future employment by the Applicant is solely at that entity's whim and discretion, subject to any limitations imposed under other federal or state laws.

However, if the Cooperating Labor Organization's characterization of this transaction is correct, the Board can only approve the transaction conditioned upon the imposition of the New York Dock employee protective conditions.¹ An important element of the New York Dock conditions is the requirement for an "implementing agreement" to be in place before the parties to a transaction take any steps that would lead to the "dismissal or displacement of any employees, or rearrangement of forces." New York Dock, Art. I, §4. That agreement must provide for "the selection of forces from all employees involved on a basis accepted as

¹The conditions imposed in New York Dock Ry.-Control-Brooklyn Eastern Dist. Term., 360 I.C.C. 60, aff'd sub nom., New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979).

appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision” arising under the New York Dock conditions. Id. Here, there can be no dispute that all of the IMRL employees will be “dismissed” when their employer is acquired by the Applicant. Under the New York Dock conditions, such an occurrence could not occur without an implementing agreement.

The former Interstate Commerce Commission (“ICC”) noted that the purpose of an implementing agreement is to provide employees with “the protection of a negotiated or arbitrated arrangement establishing seniority and the basis on which the new work would be performed.” Delaware & Hudson Ry.—Lease & Trackage Rights Exemption—Springfield Term. Ry., 4 I.C.C.2d 322, 1988 ICC LEXIS 79 at *17. The ICC held that protection is “crucial” to employees. Id. at *18. Obviously, if a stay is not granted, the Applicant and IMRL will consummate their transaction without the benefit of an implementing agreement for affected IMRL employees. Once that transaction is consummated, it would be very difficult to “unscramble the egg” and impose an implementing agreement providing for a new selection of forces and assignment of employees should we prevail in our Petition to Revoke. Indeed, the former ICC acknowledged the significance of that issue when it issued a blanket stay of pending exempt lease transactions because of their cumulative effects on employees. D&H, at *21. Accordingly, the Cooperating Labor Organizations submit they will suffer irreparable harm if the Board does not issue a stay.

Third, no other party with an interest in this proceeding will be harmed by the issuance of a stay. The only other parties directly involved in this proceeding are the IMRL, the Applicant

and the DM&E. The IMRL and DM&E are solvent carriers capable of discharging their common carrier obligations for the relatively short period necessary for the Board to consider our Petition to Revoke under the procedures set forth in 49 C.F.R. § 1121. Moreover, the Verified Notice of Exemption filed by the IC&E notes that it does not have financing in place to consummate the transaction. Verified Notice of Exemption at 3. Also, the Board's own procedures provide that a party's improper use of the class exemption procedures renders the original verified notice void ab initio. 49 C.F.R. §1150.35(f). Therefore, if the Cooperating Labor Organizations prevail in their Petition to Revoke, the Applicant, DM&E and IMRL had no right to use the class exemption procedure in the first place and cannot be harmed by issuance of a stay of the effectiveness of the exemption.

Finally, we submit the public interest favors a stay. Obviously, the public interest favors the lawful acquisition of rail carriers, so our Petition to Revoke which raises a substantial case that the proposed transaction is unlawful supports the public's interest in that matter. Also, we submit there are the following public issues raised by this proposed transaction that would better be served by a stay and a careful evaluation of the Petition to Revoke.

FINANCIAL VIABILITY - -

1. There are many questions concerning the financial viability and future stability of the proposed combination of the DM&E and the IMRL. Here, the proposed purchase by a short line railroad with marginal operating profits of a larger regional carrier with similar marginal operating profits does not appear on its face to be the harbinger of a financially healthy and viable combination. Accordingly, these issues need to be answered before the transaction can

become effective, and the time provided under the exemption process is not adequate to obtain for this purpose and to make a reasoned determination.

ENVIRONMENTAL IMPACTS - -

2. If expected coal traffic is significant and is to be routed over the IMRL lines, some environmental impacts would be posed. IMRL is basically a grain hauler, and any contemplated changes in consist and intended routings of coal, for example, would create environmental changes. Under such circumstances, it is highly likely that an Environmental Impact Analysis would be necessary.

SHIPPER IMPACTS - -

3. The expedition fostered by the exemption process will eliminate a full understanding of the impacts that the transaction will have upon IMRL shippers. Will operations be improved by the contemplated combination? As previously stated, most of the IMRL shippers are grain shippers. Will they be provided access to the DM&E route, and, if so, will that route provide them with significantly new designations or markets? These issues need to be researched by the interested parties and must be answered by the agency. This only can be accomplished if the interested parties are given adequate time to conduct discovery and present an accurate and complete record before the Board.

EMPLOYEE IMPACTS - -

4. The Cooperating Labor Organizations need to be able to conduct adequate discovery to determine the adverse effects, if any, the transaction may have upon the employees represented by them on IMRL. Discovery also is needed to accurately determine the actual nature of the

transaction. Only then can the Board and the employee representatives determine the employee protections, if any, to which they may be entitled.

If these issues are not handled properly and in a timely manner, irreparable harm will result to the public, shippers, states and municipalities and the employees of IMRL. On the other hand, no harm will result to the DM&E or IMRL if the transaction is stayed for a reasonable period in order that the interested parties are provided with an adequate opportunity for discovery, for them to file appropriate pleadings supported by evidence and for the Surface Transportation Board to review the evidence and legal arguments of the parties and to render a well-considered opinion.

The Cooperating Labor Organizations have simultaneously served upon the applicant and other members of its corporate family Requests for Production of Documents and Interrogatories. The Organizations request the Board direct applicant to respond to the discovery requests upon an expedited basis, so that they may supplement their petition to revoke and other filings can be made prior to the transaction becoming effective.

WHEREFORE, the Cooperating Labor Organizations submit that the Board should issue an order staying the transaction.

Respectfully submitted,

David Neigus/msw

David Neigus, Esq.
International Association of Machinists
9000 Machinists Place
Upper Marlboro, MD 20772
(301) 967-4510

Mitchell Kraus/msw

Mitchell Kraus, Esq., General Counsel
Chris Tully, Esq., Asst. General Counsel
Transportation Communications
International Union
3 Research Place
Rockville, MD 20850
(301) 948-4910

Donald Griffin/msw

Donald Griffin, Esq.
Assistant General Counsel
Brotherhood of Maintenance of
Way Employes
10 G Street, N.E., Suite 460
Washington, D.C. 20002
(202) 638-2135

Michael S. Wolly

Michael S. Wolly, Esq.
Zwerdling, Paul, Leibig, Kahn & Wolly
(For Intl. Broth. of Electrical Workers)
Suite 712
1025 Connecticut Ave. NW
Washington, D.C. 20036
(202) 857-5000

Harold A. Ross/msw

Harold A. Ross, Esq.
Ross & Kraushaar
(For Broth. of Locomotive Engineers)
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1702
(216) 861-1313

William L. Phillips/msw

William L. Phillips, Esq.
General Counsel
Brotherhood of Railroad Signalmen
601 West Golf Road
Box U
Mount Prospect, IL 60056
(847) 439-3732

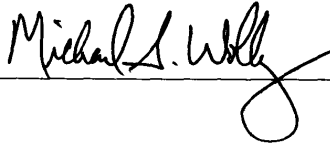
Counsel for Cooperating Labor Organizations

Date: June 13, 2002

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing Petition to Stay by overnight mail
delivery upon:

William C. Sippel, Esq.
FLETCHER & SIPPEL LLC
Two Prudential Plaza
Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721



Date: June 13, 2002