

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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DOCKET NO. FD 36390

**TRANS RAIL HOLDING COMPANY - ACQUISITION OF CONTROL
EXEMPTION - VERMONT RAILWAY, INC., THE CLARENDON AND
PITTSFORD RAILROAD COMPANY, WASHINGTON COUNTY
RAILROAD COMPANY, THE NEW YORK & OGDENSBURG
RAILWAY COMPANY, INC., AND GREEN MOUNTAIN RAILROAD
CORPORATION**

PETITION FOR RETROACTIVE EXEMPTION

Trans Rail Holding Company (TRHC), a non-carrier, respectfully petitions the Surface Transportation Board (Board) pursuant to 49 U.S.C. § 10502 and 49 C.F.R. § Part 1121 for a retroactive exemption to authorize its acquisition of the controlling stock of the Vermont Railway, Inc. (VTR), The Clarendon and Pittsford Railroad Company (CLP), Washington County Railroad Company (WACR), The New York & Ogdensburg Railway Company, Inc. (NYOG), and the Green Mountain Railroad Corporation (GMRC) (collectively the “Vermont Rail System”). These five Class III railroads were formerly controlled by the following non-carrier individuals: David W. Wulfson, Gary E. Wulfson, Lisa W. Wulfson,¹ Richard C. Szuch, and Peter A. Szuch (collectively “Sellers”).

TRHC is a holding company owned by the Sellers, and on July 1, 2006 they transferred all of their respective shares in the Vermont Rail System carriers to TRHC. In February 2020,

¹ Formerly known as Lisa Cota.

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during the course of its due diligence in regards to the potential acquisition of another Class III railroad TRHC discovered that the outside counsel Sellers had relied upon for seeking and obtaining Board authorization of their acquisitions of the individual railroads making up the Vermont Rail System, and whom also represented TRHC, had never sought authorization from this Board for the transfers to TRHC. It now seeks to expeditiously rectify that oversight.

The Board has previously granted after-the-fact retroactive exemptions to legitimize transactions that would have been proper subjects for exemptions had such relief been sought beforehand, where the applicant has demonstrated that its failure to seek authorization on a timely basis was unintentional and not for the purpose of flouting the law, the party seeks to correct its error in good faith, and the delay did not prejudice the rights of other parties. *See e.g.* FD No. 34481, *Horsehead Corp.—Petition for Retroactive Exemption—Acquisition and Operation of a line of Railroad in Carbon County, PA—Chestnut Ridge Railway Co.* (STB served March 12, 2004). TRHC respectfully submits that such relief is appropriate in this case.

BACKGROUND

The five Class III carriers making up the Vermont Rail System conduct operations in the states of New York, Vermont, and New Hampshire. The Vermont Rail System was formed by Sellers in the creation of two railroad companies and acquisition of three others by means of several transactions between 1963 and 2002, all of which were submitted to the Board or its predecessor the Interstate Commerce Commission for approval by the outside counsel in had retained for this purpose. Because VTR, CLP, and GMRC were and remain connecting Class III rail carriers, Sellers sought and obtained approval from the STB in 1998 by filing a petition for exemption under §10502 from the prior approval requirements of 49 U.S.C. §§11323-25.²

² STB Finance Docket No. 33607, *David W. Wulfson, Gary E. Wulfson, Lisa W. Cota, Richard C Szuch, and Peter A. Szuch – Control Exemption – Clarendon & Pittsford RR Co., Green Mountain RR Corp., and Vermont*

Both the WACR and the NYOG, on the other hand, are non-contiguous to each other and the other three railroads, and so approval was sought and obtained through notices of exemption.³ Accordingly, as of 2002 Sellers had obtained Board authority to own their respective controlling shares of the Vermont Rail System railroads.

In July 2006, Sellers formed TRHC to purchase the Sellers' controlling shares in the Vermont Rail System. The purchase was made via a stock swap dated July 1, 2006, such that the relative ownership of TRHC was the same as the Sellers' ownership of the individual railroads. As a non-carrier holding company, TRHC does not engage in any rail operations, nor is it involved in any of the day-to-day operations of any of the Vermont Rail System railroads.⁴ Since July 2006 each has continued to operate in the same manner as they did previously. TRHC and Sellers presumed and thereafter believed that any necessary authority from the STB for the 2006 transaction had been pursued and obtained as it had in the previous transactions. TRHC's previous outside counsel for STB matters passed away in September 2013.

In February 2020, TRHC began exploring the possibility of acquiring control of a sixth, non-contiguous Class III railroad in the same region and retained the undersigned counsel to pursue STB authority of the transaction. While conducting its due diligence regarding the purchase certain issues regarding the legal status of the target carrier came to light. In the process of resolving those issues and collecting other relevant information, TRHC discovered

Railway, Inc. (served August 20, 1998). In that proceeding Sellers sought *nunc pro tunc* approval from the STB for various transfers of the stock and other interests in the three railroad entities that took place between 1972 and 1997. The Board declined this request but stated "[t]he evidence demonstrates that petitioners' non-compliance was inadvertent and the record shows an absence of intent to flout the law or of a deliberate or planned violation." *Id.* at 3; citing *Kenosha Auto Transport Corp. – Control*, 85 M.C.C. 731, 736 (1960).

³ STB Finance Docket No. 33816, *David W. Wulfson, Gary E. Wulfson, Lisa W. Cota, Richard C Szuch, and Peter A. Szuch – Control Exemption – Washington County RR Co.* (served November 15, 1999); STB Finance Docket No. 34816, *David W. Wulfson, Gary E. Wulfson, Lisa W. Cota, Richard C Szuch, and Peter A. Szuch – Control Exemption – The New York and Ogdensburg Railway Co.* (served April 10, 2002).

⁴ For example, all of the billing practices of the Vermont Rail System railroads is handled by VTR, not TRHC.

that there was no evidence in its files that the Board had ever granted TRHC exemption authority to acquire its controlling interests in the Vermont Rail System railroads. Having subsequently confirmed that such authority was never requested, TRHC seeks to rectify its error, with retroactive effect. Obtaining the requested retroactive authority pursuant to this petition will be accompanied by a notice of exemption for TRHC acquire the new Class III railroad, which TRHC intends to submit in a separate docket shortly.

REQUEST FOR EXEMPTION

As indicated above, TRHC only recently discovered that Board approval of its acquisition by a stock swap of the shares of the railroad companies comprising the Vermont Railway System had not been sought in 2006. This failure was apparently due to an oversight of outside counsel upon which Sellers and TRHC then relied for such actions, rather than any intention on TRHC's or Sellers' part to circumvent Board authority. Indeed, Sellers had no reason to avoid such a filing. TRHC is seeking to correct that mistake expeditiously.

TRHC believes that had the required filings been timely submitted in 2006, the Board would have concluded that its acquisition of the controlling shares of the Vermont Rail System railroads easily met the standards under §10502 for an exemption of the prior approval requirements of 49 U.S.C. §§11323-25. This is primarily because the Board had previously granted the petition for exemption for the Sellers' acquisition of the controlling stock of VTR, CLP and GMRC. As for the NYOG and WACR, TRHC's acquisition of their controlling stock in 2006 would have been deemed exempt from the prior approval requirements of §11323-25 by operation of 49 C.F.R. §1180.2(d)(2). The only thing that has changed is that TRHC, which is only a holding company owned by the Sellers, subsequently acquired the Sellers' respective interests in those railroads. Thus, as was the case in 2006, the situation with respect to TRHC's

acquisition of the controlling stock of these railroads the situation remains that (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. §10101 and (2) regulation is not needed to protect shippers from the abuse of market power.⁵ 49 U.S.C. §10502(a). See, e.g., 49 U.S.C. 10101(2), which states part of the RTP is “to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required; (7) “to reduce regulatory barriers to entry into and exit from the industry; and (15) “to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.” TRHC therefore asserts the Board should grant this petition for exemption and approve the prior transaction.

TRHC also respectfully asks the Board to grant this authority retroactive to July 1, 2006. First, the failure to seek such authority in 2006 was unintentional and inadvertent, and TRHC is acting to correct the deficiency expeditiously and in good faith.⁶ Second, the delay in bringing this matter before the Board has not prejudiced or harmed any railroads, their customers, or third parties. As stated above, TRHC is merely a holding company, and each of the individual railroads making up the Vermont Rail System have continued to operate independently since July 2006 as they did before, without any involvement of TRHC in their day-to-day operations. As a result, the acquisition of their controlling stock by TRHC has not had any impact on the railroad operations of the Vermont Rail System. Moreover, in the unlikely event that a party would have wished to challenge TRHC’s acquisition of the controlling stock of the Vermont Rail

⁵ The transaction is also limited in scope, as it only involves five Class III railroads. §10502(a)(2)(A).

⁶ FD No. 35363, *R.J. Corman Railroad Property, LLC - Acquisition Exemption - NC Railroad, Inc.* (STB served June 29, 2011), slip op. at 5; FD No. 34481, *Horsehead Corporation - Petition for Acquisition and Operation Exemption - Chestnut Ridge Railway Company* (served March 12, 2004), slip op. at 2; FD No. 32964 *Brotherhood of Maintenance of Way Employees, et al. v. Soo Line Railroad Company, et al.*, (STB served December 22, 1998), slip op. at 6, fn. 16.

System railroads, they are still able to do so under a petition to revoke, which would have been available to them if TRHC had sought Board approval in a timely fashion.

Finally, approval back to July 1, 2006 is requested in order to maintain appropriate continuity over the chain of ownership of these five railroads and avoid the potential for their business operations to be disrupted or disturbed due to the TRHC ownership issue.

TRHC regrets the fact that proper authorization for its purchase of the controlling shares of the Vermont Rail System was not sought in a timely manner and apologizes to the Board for this failure, which again was inadvertent and rather not an attempt by TRHC to flout the applicable rules. TRHC requests that in light of the circumstances explained above, and after due consideration, the Board act favorably on this petition for retroactive exemption, and thereby authorize *nunc pro tunc* its acquisition of the controlling stock of the Vermont Rail System from July 1, 2006 to present.

Respectfully submitted,



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Dated: March 6, 2020

VERIFICATION

I, Lisa Wulfson, declare under penalty of perjury that the factual information contained in the foregoing Petition for Retroactive Exemption is true and correct.

Executed: March 6, 2020

A handwritten signature in blue ink, appearing to read "Lisa Wulfson", is written over a horizontal line.

Title: Executive Vice President, Secretary
Trans Rail Holding Company