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May 31, 2019

ENTERED
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VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: **Docket No. FD 33990**
C & C Railroad, Inc. – Operation Exemption – CenterPoint
Properties, L.L.C.

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding on behalf of the C & C Railroad, LLC (formerly C & C Railroad, Inc.) is a Reply in Opposition to the Petition of Union Pacific Railroad Company to Revoke and Void Exemption.

Should any questions arise regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Robert A. Wimbish
Attorney for C & C Railroad, LLC

RAW/ah
Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 33990

**C & C RAILROAD, INC.
– OPERATION EXEMPTION –
CENTERPOINT PROPERTIES, L.L.C.**

**REPLY OF C & C RAILROAD, LLC, IN OPPOSITON TO THE PETITION OF
UNION PACIFIC RAILROAD COMPANY TO REVOKE AND VOID EXEMPTION**

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ATTORNEYS FOR C & C RAILROAD, LLC

Dated: May 31, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 33990

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– OPERATION EXEMPTION –
CENTERPOINT PROPERTIES, L.L.C.**

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UNION PACIFIC RAILROAD COMPANY TO REVOKE AND VOID EXEMPTION**

On May 1, 2019, Union Pacific Railroad Company (“UP”) filed in the above-referenced docket what it has styled as a “Petition to Revoke and Void Exemption” (the “Petition”) targeting a class exemption invoked by C & C Railroad, LLC (“C&C” – previously organized as C & C Railroad, Inc.)¹ 18 years ago. The Petition relates to UP’s ongoing state court efforts to evict C&C and its parent company – The Custom Companies, Inc. (“Custom”) – from property now owned by UP. The Petition claims that C&C deliberately misled the Surface Transportation Board (the “Board”) into accepting the subject class exemption notice by providing a supporting map that suggested the existence of a UP yard track connection that may have been removed just prior to C&C’s exemption filing. Acknowledging that it had been directed by the involved state court to secure Board discontinuance authority for C&C as a prerequisite to further state court eviction proceedings, UP hopes by its Petition to short-circuit the formal discontinuance procedures that otherwise would apply.

¹ C & C Railroad Inc. – Reincorporation Exemption – C & C Railroad LLC, Docket No. 34062 (STB served Jul. 23 2001).

UP would prefer a more convenient process by which to attempt to remove Custom and C&C from UP's sprawling Global II facility, but UP's attempt to bypass the appropriate discontinuance process is legally unsupported. UP has failed prove that, at the time of C&C's exemption filing nearly two decades ago, the connecting yard trackage could not, or would not, be restored, if indeed it was missing at all. UP does not bother to explain why it acquiesced for 18 years in C&C's presence as a rail carrier within Global II.

Rather, UP argues that, with the amazing foreknowledge of this day and circumstance, C&C had contrived 18 years ago to forestall its future eviction by invoking common carrier status. UP imputes to C&C a *post hoc* motivation to the class exemption filing that UP cannot possibly prove. But UP cannot be permitted to re-contextualize C&C's long-ago invocation of a class exemption. And UP has nothing, aside from a map to serve as "evidence" that C&C had perpetrated a fraud upon the agency. UP's Petition must be denied, recognizing that the proper course all along, as UP well knows, is, and has been, for UP to invoke the Board's discontinuance procedures if it intends to move ahead with removing C&C from Global II, as the state court has directed.

OVERVIEW

C&C acknowledges the basic facts set forth in UP's Petition. On January 2, 2001, C&C invoked the Board's class exemption procedures to operate as a rail common carrier over approximately 1.71 miles of track proximate to UP yard facilities now known as Global II (also known as Proviso Yard). The exemption notice was the subject of an unsuccessful stay request by Joseph C. Szabo, on behalf of the United Transportation Union-Illinois Legislative Board

(“UTU-IL”),² the Board published notice of the exemption in the Federal Register on January 17, 2001, and the exemption took effect on January 9, 2001. At the time that C&C filed its notice of exemption, the UP yard tracks that historically had connected to the C&C tracks recently may have been removed.³ The map that C&C had supplied with its exemption notice depicted the location of C&C’s trackage. However, contrary to UP’s claims, that map *does not* depict where and how those tracks connect to UP’s tracks; instead, the map only shows that the C&C tracks – the “Subject Terminal Rail Lines” – are proximate to the “Union Pacific Global Two Intermodal Yard.” C&C made no statement in the notice filing that connecting yard track was present. UP’s Petition does not indicate whether UP was aware of any missing yard track connections at the time; does not indicate whether or not it was willing to restore the track connections (if they were missing); and avoids explaining why UP took no action on the disputed exemption until 18 years later, when UP decided to evict C&C and Custom.

UP argues that the alleged absence of connecting UP yard track on C&C’s map supporting its exemption notice was intended to mislead. UP would have the Board pre-suppose, without any supporting context, that C&C lied to the Board about its common carrier prospects, and that the Board relied upon that misrepresentation in allowing C&C’s exemption to take effect. And UP objects to the proposition that it must comply with the state court’s order that UP

² Among other things, UTU-IL had expressed concerns that UP employees would be adversely affected by the proposed transaction. In its stay request, UTU-IL indicated that it intended to file a petition to reject or to revoke C&C’s exemption notice, but the record suggests that UTU-IL made no such filing.

³ UP points to no precise date upon which the connecting yard tracks were removed. It is, instead, reduced to a guess, relying on circumstantial evidence, to determine when the yard track in question was removed. C&C believes that the yard tracks may have been in place as of 2001, and it remains possible that the tracks were indeed in existence at the time of C&C’s exemption filing. At the time of C&C’s filing, for example, Toyota Motor Corporation (“Toyota”) had been a customer and a tenant within the terminal facility that C&C sought to operate as a rail common carrier and a tenant in the terminal. Toyota conducted a large amount of rail business with the UP from within the terminal at the time.

seek discontinuance authority against C&C as a prerequisite to proceeding with eviction efforts. The Petition invites the Board to take a “leap of cynicism” in accepting the proposition that C&C materially misled the Board some two decades ago, so that UP may enjoy a shortcut around a potential adverse discontinuance.

ARGUMENT

UP’s Petition relies upon baseless assumption and innuendo to try to persuade the Board that allegedly missing yard track in a map supporting C&C’s class exemption filing – which does not actually show the connecting UP track in question – was purposeful, material, conniving, and fatal to the exemption. C&C vehemently disputes the allegation that it had ever calculated to deceive the Board, or that it knowingly filed its class exemption with the knowledge that the initiation of rail common carrier service was impractical or impossible. Rather, at the time of its exemption filing, if indeed connecting UP track was missing, C&C would have contemplated, and would have had reason to believe, that it needed only to work with UP to restore a few hundred feet of missing yard track for C&C operations to commence, and that UP would be willing to restore the necessary track connections.

UP’s far-fetched conspiracy theory to the contrary, it is far easier to accept that C&C invoked the Board’s exemption procedures in good faith (as it did again when it changed its corporate structure); that C&C genuinely intended to provide common carrier service. At no time contemporaneous to the filing of the exemption notice did UP object to C&C’s exemption notice or advise C&C (or the Board, for that matter) that the relevant yard track – (a) was missing; and (b) would not, or could not, be restored. C&C has no contemporaneous records – and UP has provided none – to show that C&C had reason to believe that UP would have refused to restore the connections were they missing.

Restoring UP yard track to connect to C&C's lines at the time that it filed its exemption notice (were the UP track actually missing), would have been both practicable and easily foreseeable. The amount of track that is now missing – a few hundred feet, in total – could have been reinstalled, and C&C has reason to believe that such a re-connection would have been contemplated at the time.⁴ Were a connection unlikely or impossible, one would have expected UP to respond to the exemption at least upon Federal Register publication, but UP did neither, a point that UP avoids explaining in its Petition. More likely than not, at the time, UP would have been receptive to re-establishing a connection were it missing, which likely explains why UP made no attempt to challenge the class exemption in 2001.

Which begs the question: Given the tone of UP's petition, and the unsupported accusation that C&C's exemption notice was based upon an alleged, purposeful lie, why then would UP wait until now to object, particularly since UP seems to feel so strongly about it? UP has long acquiesced in C&C's common carrier status, until such acquiescence, years later, proved inconvenient for UP. At a minimum, UP was constructively aware of C&C's invocation of the Board's class exemption procedures to become a common carrier (due to the Federal Register notice), and it knew, or should have known, about the status of the connecting yard track. Accordingly, the principles of administrative finality should apply here, particularly where it is apparent that UP has effectively – and inexplicably – slept on its asserted rights for nearly two decades.⁵ For this reason, C&C's exemption should be neither revoked nor voided.

⁴ One of the principals who at the time established C&C is no longer with the company, but C&C has good reason to believe that C&C management would not have sought at the time to create C&C as a rail carrier were re-establishing a connection to UP tracks impossible or unlikely. UP, for its part, does not argue that re-establishing a connection would have been impossible or infeasible.

⁵ See, e.g., Indiana Hi-Rail Corporation – Lease and Operation Exemption – Norfolk & Western Railway Company Lines Between Rochester and Argos, Indiana And Exemption from

UP makes very clear that the driving force behind its Petition is its desire to be excused from pursuing an adverse discontinuance against C&C. Seeking a revocation or nullification of C&C's 18-year-old exemption based entirely upon a map included with C&C's exemption filing is a potentially convenient regulatory "out" for UP. But the Petition offers no precedent supporting the use of exemption revocation or nullification as a means to avoid an adverse discontinuance proceeding. In fact, Board precedent has *rejected* the use of alternative procedures to short-circuit the application of adverse abandonment or discontinuance processes to remove a common carrier such as C&C.⁶ For this reason, also, C&C's exemption should be neither revoked nor voided.

Finally, although entitled as a request to revoke C&C's exemption, UP's Petition never bothers to refer to the statutory criteria for exemption revocation set forth at 49 U.S.C. §

49 U.S.C. §§ 10761, 10762, and 11144, Docket No. FD 32162 (ICC served Jan. 30, 1998), slip op. at 4-5 (petition for revocation denied; the petitioner had waited more than two years after the contested exemption had become effective to seek revocation); S.R. Investors Ltd. doing business as Sierra Railroad Company – Abandonment – in Tuolumne County, California, Docket No. AB-239X (ICC served January 20, 1988); 1988 WL 225711 at * 9 (opponents to an abandonment exemption sought unsuccessfully to have the ICC revoke the exemption. The ICC found that, after the passage of considerable time, the exemption should be upheld. "If rail carriers . . . are unable to rely upon [an ICC exemption] over a year after it has become final and effective . . . , there would be no end to the administrative process and no certainty in administrative decision making"); Midwestern Rail Properties, Inc., Subsidiary of Chicago & North Western Transportation Company – Purchase (Portion) – Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) – Lines in Minnesota, Iowa, and Missouri, 366 ICC 915, 922 (1983); Peerless Transport Corp., Reopening of Petition, 130 MCC 434, 498 (1976) (citing Hughes Transportation Inc. v. United States, 115 F. Supp. 1 (1953); cf. Consolidated Rail Corporation – Abandonment Exemption – In Erie County, NY, Docket No. AB-167 (Sub-No. 1164X), et al. (STB served Oct. 7, 1998).

⁶ See, e.g., Canadian National Railway Company – Trackage Rights Exemption – Bangor and Aroostook Railroad Company and Van Buren Bridge Company, Docket No. FD 34014, et al. (STB served Jun 25, 2002) (revocation of a trackage rights-holder's exemption authority as a means to evict the trackage rights-holder not appropriate as a means to avoid a trackage rights discontinuance proceeding); Milford-Bennington Railroad Company, Inc. – Trackage Rights Exemption – Boston and Maine Corporation and Springfield Terminal Railway Company, Docket No. FD 32103 (ICC served Sept. 3, 1993).

10502(d), much less to apply those revocation standards. UP does not explain why it would be appropriate, some two decades after the exemption had taken effect, for the Board to reopen the proceeding and revoke C&C's common carrier authority, nor could it. Having failed to satisfy the Board's revocation criteria, UP's request to revoke the class exemption must be denied.

CONCLUSION

Some 18 years after the fact, UP would like for the Board to reconsider a long-standing class exemption held by C&C, establishing C&C as a rail carrier subject to Board jurisdiction. Relying on circumstantial evidence regarding the status of connecting yard trackage, UP – driven by its contemporary hopes to rid itself of C&C quickly – claims that C&C's exemption notice was a mere connivance, and that the Board was duped into accepting C&C's notice filing. The facts here do not bear out such a conclusion, and the Board should reject UP's cynical conjecture that C&Cs' exemption filing was calculated to forestall UP's eviction action decades into the future.

There is insufficient evidence to support revoking or nullifying C&C's exemption, and the end-run that UP self-servingly seeks to achieve by depicting C&C as dishonest runs counter to agency precedent which clearly disfavors such attempts to evade the appropriate use of the Board's discontinuance of service procedures in the ordinary course. For these reasons, UP's Petition must be denied in its entirety.

Respectfully submitted,

By: 

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ATTORNEYS FOR C & C RAILROAD, LLC

Dated: May 30, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of May, 2019, a copy of the foregoing **Reply of C & C Railroad, LLC in Opposition to the Petition of Union Pacific Railroad Company to Revoke and Vacate Exemption** was served by U.S. Mail, first class postage prepaid, or by more expeditious means of delivery, upon all parties of record.


Robert A. Wimbish