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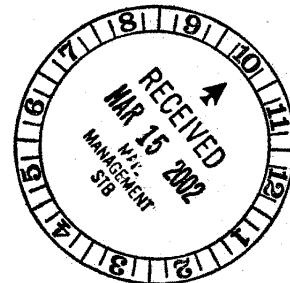
BEFORE THE
SURFACE TRANSPORTATION BOARD

204980
BULKMATIC RAILROAD)
CORPORATION -- ACQUISITION)
EXEMPTION -- BULKMATIC)
TRANSPORT COMPANY)

FINANCE DOCKET
NO. 34145

BULKMATIC RAILROAD)
CORPORATION -- OPERATION)
EXEMPTION -- BULKMATIC)
TRANSPORT COMPANY)

FINANCE DOCKET
NO. 34179



204981
REPLY IN OPPOSITION TO PETITION
TO REJECT AND/OR REVOKE EXEMPTION

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DATE FILED: March 15, 2002
DUE DATE: March 25, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

BULKMATIC RAILROAD	)	
CORPORATION -- ACQUISITION	)	FINANCE DOCKET
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TRANSPORT COMPANY		

**REPLY IN OPPOSITION TO PETITION
TO REJECT AND/OR REVOKE EXEMPTION**

Pursuant to 49 C.F.R. § 1104.13(a), BULKMATIC RAILROAD CORPORATION (BMRC), hereby replies in opposition to a Petition to Reject and/or Revoke and for Stay of Exemption, filed by Joseph C. Szabo, in behalf of United Transportation Union - Illinois Legislative Board (UTU), on March 4, 2002 (Petition). The requested stay has been denied in a decision served March 5, 2002.

Scope of Reply

Although this reply is filed in both dockets that appear in the caption, it appears to BMRC that Finance Docket No. 34145 covers both BMRC's acquisition and operation of the trackage at issue, in which case the notice of exemption in Finance Docket No. 34179 for BMRC's operation of that trackage is superfluous. If the Board agrees, it would be appropriate to dismiss that notice of exemption. BMRC would agree to a voluntary withdrawal or dismissal of that notice of exemption in that circumstance.

When the notice of exemption in Finance Docket No. 34145 was filed, it was contemplated that BMRC would acquire the trackage by sublease, but would not operate the trackage. Consequently, the notice of exemption in that docket was filed only for acquisition of the trackage. It was contemplated that Chicago Heights Switching Company (CHSC) would operate the trackage. A notice of exemption for CHSC's operation of the trackage was filed in Finance Docket No. 34146.

Subsequently, it was determined that BMRC, instead of CHSC, would be the operator of the trackage. Consequently, the operating authority represented by the exemption in Finance Docket No. 34146 was not consummated.

As a cautionary matter, BMRC filed a notice of exemption for operation of the trackage in Finance Docket No. 34179. However, it appears likely that authority for acquisition of trackage, when it is contemplated that another entity will operate such trackage, carries with it residual authority for operation of that trackage if the other entity does not operate it. That proposition is based on the settled principle that an entity that acquires an active rail line that is to be operated by another retains a residual common carrier obligation to operate the line in the event that the other entity does not do so. *See, e.g., Southern Pacific Transp. Co. - Abandonment*, 8 I.C.C.2d 495 (1992), at 503-505, citing *City of Austin, TX -- Acquisition -- Southern Pacific Transportation Co.*, ICC Finance Docket No. 30861(A), decision served Nov. 4, 1986 (not printed). ("When a noncarrier acquires an operating rail line, it assumes the common carrier obligation to ensure service over the line and retains that obligation whether it physically operates the line or leases the line to another for operations."). If the acquirer has a

common carrier obligation to operate the line by virtue of its acquisition of the trackage, necessarily it must also have common carrier authority to operate the line.

The Board should find that the exemption in Finance Docket No. 34145 covers both BMRC's acquisition and its operation of the trackage at issue. The notice of exemption in Finance Docket No. 34179 should be voluntarily dismissed or withdrawn as duplicative of the operating exemption in Finance Docket No. 34145, and thus superfluous.

I. Reply In Opposition To The Request For Rejection

The request for rejection of the exemptions is based on a contention that by virtue of 49 U.S.C. § 10906, the trackage at issue is excepted from Board authority under 49 U.S.C. § 10901 because such trackage is spur, industrial, team, switching or side tracks. UTU seeks rejection of the notices of exemption on the ground that the Board thus lacked statutory authority to exempt acquisition and operation of the trackage from 49 U.S.C. § 10901.

UTU's position in that respect lacks legal merit. Contrary to UTU's contention, the trackage at issue is a line of railroad as to BMRC under the "purpose and effect qualification" of the "tenant-use test", as hereafter explained. Consequently, the Board had the authority to exempt the transactions at issue from 49 U.S.C. § 10901.

Under the "tenant-use test", it is a tenant's use of trackage, rather than the owner's use, that determines whether such trackage is a line of railroad over which the Board has authority or spur or other trackage excepted from Board authority under 49 U.S.C. § 10906. *Brotherhood of Locom. Engrs. v. United States*, 101 F.3d 718, 727 (D.C. Cir. 1996) ("BLE case"), denying petitions for review of decisions in *Brotherhood of Locom. Engrs. v. Union Pacific RR Co.*, 1995 ICC LEXIS 113, ICC Finance Docket No. 32127, decision served May 16, 1995, and

Brotherhood of Locom. Engrs. v. Union Pacific RR Co., 1995 ICC LEXIS 281, ICC Finance Docket No. 32394, decision served Nov. 6, 1995; *Accord: St. Louis San Francisco & Texas Ry. Co. Trackage Rights*, 267 I.C.C. 30, 35-36 (1946); *Central RR of NJ Trustees Acq. of Trackage Rights*, 254 I.C.C. 344, 348 (1943); and *Texas & Pac. Ry. Co. et al. Operation*, 247 I.C.C. 285, 291 (1941).

The Court in the *BLE* case, *supra*, found “solid support” for the tenant-use test, and articulated the “purpose and effect qualification” of that test, *viz.* (101 F.3d, at 728):

Although we find solid support for the Commission’s tenant-use test, the Supreme Court’s decision in *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U.S. 266, 70 L.Ed. 578, 46 S.Ct. 263 (1926), suggests one important qualification. In *Texas & Pacific*, the Court rejected the ICC’s reliance on the spur- or industrial-track exception to avoid jurisdiction over construction of a track segment even though the segment was not part of a through line and would only be used to serve industrial shippers located along it. Looking beyond the immediate use of the track segment, the Court examined the “purpose and effect” of its construction. “If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory,” Justice Brandeis wrote for the Court, then the trackage qualifies as “an extension of the railroad” within the ICC’s jurisdiction and could not be excepted from that jurisdiction. *Texas & Pacific*, 270 U.S. at 278.

Texas & Pacific thus places a limit on the ICC’s reliance on a tenant-use test. While the Commission may look to the tenant’s use as the controlling factor determining the character of track for the purpose of finding exceptions to its jurisdiction, it may not allow its focus on use to obscure the larger purpose and effect of the transaction at issue. In the cases before us, for example, although the ICC may focus on the tenant railroads’ use of the tracks solely for switching operations as the controlling factor in determining the tracks’ character, if those switching operations have the effect of substantially extending the railroads’ lines into new territory, then the Commission may not decline jurisdiction.

On two recent occasions, the Board has applied the purpose-and-effect qualification of the tenant-use test to assert authority over trackage that was claimed by UTU to constitute

excepted track under 49 U.S.C. § 10906, and in both such instances the Board's decisions were upheld on judicial review.

The first such decision is *Chicago Rail Link, LLC - Lease & Oper. - Union Pacific RR Co.*, 2 S.T.B. 534 (1997); *aff'd sub nom. United Transp. Union v. STB*, 169 F.3d 474 (7th Cir. 1999) ("*Chicago Rail Link*"). In that case, Chicago Rail Link, a Class 3 rail carrier, agreed to lease and operate approximately 8.5 miles of trackage in UP's Irondale Yard in Chicago, IL. (2 S.T.B. at 534). The trackage leased and operated had the following identity and uses:

Track No.	Use
110	for storage of cars
1 and 2	for holding cars
3 and 4	for pulling cars by other rail carriers
5, 6 and 7	for delivery of cars from other rail carriers
8 and 9	for Bulkmatic business (a shipper)
500, 501, 710 and 711	for Cargill business (a shipper)

It thus appeared that Chicago Rail Link was using the leased trackage to serve new shippers in addition to performing switching operations. (*Id.* at 538). UTU argued that the leased trackage constituted spur, industrial, team, switching or side tracks within the meaning of 49 U.S.C. § 10906, over which the Board lacked authority under 49 U.S.C. § 10902 or 49 U.S.C. § 10502(a). (*Id.* at 537).

The Board found that the trackage is a line of railroad as to Chicago Rail Link, over which it has authority under § 10902 and § 10502(a). The Board relied on the purpose-and-effect qualification of the tenant-use test. (*Id.* at 541):

Applying the law to the facts of this case, we conclude that, as to the tenant, CRL, the subject track is not yard or switching track. This is not a case in which a carrier simply proposes to serve its existing customers more efficiently. Cf. *BLE v. STB*, *supra*, at 728. By means of the lease transaction, CRL intends to extend its operations to reach new customers. Thus, the transaction contemplates "an extended or additional rail line." The fact that the subject trackage is short is not significant here. As CRL's operation under its lease takes the subject track beyond switching track, the lease transaction falls outside of the exception of section 10906 and is subject to section 10902. (footnote omitted).

In affirming the Board's finding in that respect, the Court in *United Transp. Union v. STB*, *supra*, said (169 F.3d at 479):

... We cannot say that the Board was unreasonable ... to determine that reaching two new shippers makes the track to be rail line under (the) tenant-use test.

The second such decision is *Effingham R.R. Co. - Pet. for Declaratory Order*, 2 S.T.B. 606 (1997), pet. for reconsideration denied by decision in STB Docket No. 41986, served Sept. 18, 1998 (not printed), *aff'd sub nom. United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606 (7th Cir. 1999) ("*Effingham*"). In that case, a noncarrier, Effingham Railroad Company (ERRC), proposed to provide rail service to an industrial park at Effingham, IL. ERRC's initial carrier activity involved operation over a 206-foot track owned by a warehouse operator in the industrial park. That track was part of a 490-foot track that extended between a rail line owned by Conrail and the warehouse site. Conrail owned the portion of the 490-foot track not owned by the warehouse operator. Conrail formerly had owned the entire 490-foot track and had operated over it as an industrial spur to provide service to the predecessor of the current warehouse operator. ERRC interchanged traffic with Conrail at the point on the 490-foot track at which the portions of track owned by the warehouse operator and Conrail connected. The 206-foot track operated by ERRC was used to transport shipments of beer to the warehouse site, where the beer

was transloaded from rail cars to trucks for delivery (2 S.T.B. at 607; decision served Sept. 18, 1998 at 2-3).

In finding that the 206-foot track is a line of railroad subject to its authority, the Board said (decision served Sept. 18, 1997 at 5):

In the initial notice, even under its new approach, ERRC became the operator of a line of track connecting Conrail to the site of the industrial park. Conrail clearly had operated this short track segment as an exempt siding or spur. However, because it was ERRC's initial railroad operation, this track segment became ERRC's entire line of railroad and was not, as to ERRC, a siding or spur. This small piece of trackage initiated ERRC's service from a connection or interchange point with Conrail to a shipper's facility within the industrial park. Thus ERRC's becoming the operator was the proper subject of the initial notice of exemption and was not statutorily exempt under section 10906.

In affirming that determination on review, the Court said (183 F.3d at 613-614):

... The Union objects that it was unreasonable to classify the beer track as railroad line under Effingham Railroad's proposed use, since the Board had hitherto classified that track as spur under the use made of it as siding by Conrail, the previous tenant. But the Union cites no authority for the proposition that a previous tenant's use controls over the present tenant's use. It was reasonable for the Board to classify the track in virtue of the present tenant's use.

The trackage at Bulkmatic Distribution Center at Chicago Heights, IL unquestionably constitutes a line of railroad as to BMRC under the purpose-and-effect qualification of the tenant-use test. Indeed, the operating scenario at Bulkmatic Distribution Center is essentially indistinguishable from the operating situation involving the beer track in the *Effingham* case. Here, as in the *Effingham* case, operation over the trackage by the prior rail carrier (Union Pacific) may have been as an exempt siding or spur. However, as to the present tenant, BMRC, operation over the trackage is its initial railroad operation and such trackage became its entire line of railroad. The purpose and effect of BMRC's new operation of the trackage is to provide

rail service to a new shipper at the Bulkmatic Distribution Center, which theretofore had been served by Union Pacific. That being the case, the involved trackage is a line of railroad under the purpose-and-effect qualification of the tenant-use test. Consequently, UTU's petition to reject the notice of exemption should be denied.

II. Reply In Opposition To Petition To Revoke Exemption

Pursuant to 49 U.S.C. § 10502(d), the Board may revoke an exemption if it finds that regulation of the transaction at issue is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. The party seeking revocation has the burden of proof. *I&M Rail Link, LLC -- Acq. & Oper. Exem. -- Canadian Pacific Ry.*, 2 S.T.B. 167, 174 (1997). Petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. *CSX Transp., Inc. -- Aban. -- in Randolph County, WV*, 9 I.C.C.2d 447, 449 (1992). The Board's analysis focuses on the sections of the rail transportation policy related to the underlying statutory section from which the exemption is sought. *Missouri Pac. R. Co. -- Aban. Exempt. -- Counties in Oklahoma*, 9 I.C.C.2d 18, 25 (1992).

UTU contends that regulation of BMRC's acquisition and operation of the trackage is necessary to carry out the rail transportation policy, but its argument does not focus on any particular policy. UTU cites the policies found at 49 U.S.C. §§ 10101(3)(4)(5)(9) and (11). (Petition at 10-11). However, UTU has not sustained its burden of proof as to any of those policies.

The policy of 49 U.S.C. § 10101(3) is to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board. BMRC's

acquisition and operation of trackage under 49 U.S.C. § 10901 have little to do with adequate revenues. UTU seizes on the term “safe” in this policy, but safety regulation long ago was transferred from the ICC to the Federal Railroad Administration (FRA). UTU argues that BMRC has not shown that its personnel can meet FRA safety standards, which include licensing of locomotive engineers. (Petition at 10). Safety regulation in that respect is for the FRA, not this Board. UTU has the burden of proof backwards in any event. UTU has the burden to show conditions that call for regulation under the rail policy. *See City of Ottumwa v. STB*, 153 F.3d 879, 884 (8th Cir. 1998). It has not done so.

UTU claims that to add BMRC to the routing of traffic to and from the Bulkmatic Distribution Center would be “unsound and inefficient transportation”; would be “contrary to competitive policy”; and would involve “additional record-keeping and confusion”. (Petition at 10). UTU cites 49 U.S.C. §§ 10101(4)(5) and (9), apparently implying that regulation of BMRC’s acquisition and operation is necessary to carry out those rail transportation policies.

None of those allegations bears on whether an acquisition and/or operation should be authorized under 49 U.S.C. § 10901. Such an acquisition and/or operation is to be authorized unless it is found to be “inconsistent with the public interest”. *See* 49 U.S.C. § 10901(c). That is a quite liberalized standard for authorization. An acquisition and/or operation is not to be found to be inconsistent with the public interest because it results in an additional carrier in the routing, or increases competition, or adds to record-keeping.

The issues raised by UTU thus do not bear on the pertinent statutory standard. Neither do the rail transportation policies cited by UTU. The policy of 49 U.S.C. § 10101(4) is to ensure the development and continuation of a sound rail transportation system with effective competition

among rail carriers and with other modes, to meet the needs of the public and the national defense. The policy of 49 U.S.C. § 10101(5) is to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes. The policy of 49 U.S.C. § 10101(9) is to encourage honest and efficient management of railroads. It is not apparent how regulation of BMRC's acquisition and operation of trackage could be necessary to carry out any of those policies. UTU has made no showing to that effect.

UTU has cited the policy of 49 U.S.C. § 10101(11) to encourage fair wages and safe and suitable working conditions in the railroad industry. (Petition at 11). However, UTU has neither alleged nor proven that BMRC's acquisition and operation would adversely affect wages or working conditions, such that regulation would be essential to carry out that policy. It is pertinent in that respect that the agency's discretionary authority in former 49 U.S.C. § 10901(e) to impose labor protective conditions in § 10901 transactions was deleted in the ICC Termination Act of 1995, so that the Board no longer has authority to protect labor in such transactions. *See Class Exem. for the Construction of Connecting Track*, 1 S.T.B. 75, 85 (1996).

UTU also makes a generalized argument, unrelated to any rail transportation policy, to the effect that BMRC is "not a true common carrier" because it has not demonstrated an intent to solicit or handle traffic other than for Bulkmatic Transport Company (BTC). However, that argument is refuted in the notice of exemption.

The Bulkmatic Distribution Center is a rail-to-truck transloading facility operated by BTC. However, BTC does not own nor have any financial interest in the commodities that are transloaded at that location. BTC holds out its transloading services to the general shipping

public. Correspondingly, BMRC will hold out its rail service to the general public by means of providing rail service at the Distribution Center. A wide variety of shippers utilize the transloading facilities at the Distribution Center (Notice of Exemption in Finance Docket No. 34179 at 2). Consequently, BMRC already holds itself out to serve the general shipping public at the Distribution Center. In addition, BMRC will hold itself out to provide rail service for any other transloaders and/or shippers that might locate at the Distribution Center in the future.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, UTU's Petition should be denied.

Respectfully submitted,

BULKMATIC RAILROAD CORPORATION
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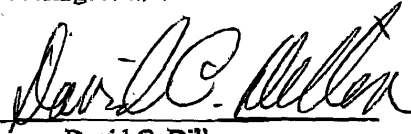
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Attorney for Applicant

DUE DATE: March 25, 2002

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2002, I served the foregoing document, Reply In
Opposition To Petition To Reject And/Or Revoke Exemption, on Gordon P. MacDougall, 1025
Connecticut Avenue, Washington, DC 20036 by UPS overnight mail.

A handwritten signature in cursive script, appearing to read "David C. Dillon", written over a horizontal line.

David C. Dillon