

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

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205403
FINANCE DOCKET
NO. 34145

FINANCE DOCKET
NO. 34179
205404



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

Office of the Secretary
May 16 2002
Public Record

BULKMATIC RAILROAD CORPORATION
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DUE DATE: May 16, 2002

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SURFACE TRANSPORTATION BOARD

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CORPORATION -- ACQUISITION	)	FINANCE DOCKET
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**REPLY IN OPPOSITION TO SUPPLEMENT TO PETITION
TO REJECT AND/OR REVOKE EXEMPTION**

Pursuant to the first ordering paragraph on page 3 of the decision of the Board in this matter served April 3, 2002, BULKMATIC RAILROAD CORPORATION (BMRC) hereby replies in opposition to Supplement to Petition to Reject Notice and/or to Revoke Application of Class Exemption, filed by Joseph C. Szabo, in behalf of United Transportation Union - Illinois Legislative Board (UTU), on May 1, 2002 ("Supplement").

A. Reply to Supplement re Rejection

UTU has attempted to distinguish the present case from the *Effingham* case^{1/} on a number of grounds, but none of those attempts has merit.

1. Alleged Sham Transaction (Supplement at 12)

The affiliation between BMRC and Bulkmatic Transport Company (BTC) is not a distinguishing factor. (Supplement at 12). There is no indication in the *Effingham* case that the

^{1/} *Effingham RR Co. - Pet. for Declaratory Order*, 2 S.T.B. 606 (1997), pet. for recons. den. 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).

unaffiliated status of the carrier and shipper there was an essential element of the decision in that case. There is nothing unlawful or particularly unusual about a rail carrier providing service for an affiliated shipper. BMRC provides service for the many shippers who use BTC's transloading service. There is no evidence to support UTU's contention that the sublease between BTC and BMRC is a sham transaction. BMRC's use of personnel furnished by an independent entity to provide rail operations does not bear on the *bona fides* of the BTC-BMRC sublease transaction. BMRC undertakes all obligations of a rail carrier and holds out its services as such a carrier.

2. Application of the Tenant-Use Test (Supplement at 12-14)

The Board took jurisdiction in the *Effingham* case pursuant to the "purpose-and-effect" qualification of the "tenant-use" test. *See* decision in STB Docket No. 41986, served Sept. 18, 1998 at 5. It does not matter, therefore, that BMRC and Union Pacific Railroad Company (UP) may have made the same use of the trackage here at issue. (Supplement at 13). The carriers in the *Effingham* case made the same use of the track involved in that case. It was the purpose and effect of the new carrier's use (to provide service to a new shipper) that was jurisdictionally significant in that case. So, too, the purpose-and-effect qualification is jurisdictionally significant in the present case.

3. Industrial Park Limits (Supplement at 14)

The decision served April 10, 2002 in STB Finance Docket No. 34081, *Effingham Railroad Company -- Operation Exemption -- Line Owned by Total Quality Warehouse*, does not bear on the issue before the Board here. (Supplement at 14). That decision involved operation over trackage constructed wholly within an industrial park to enable a rail carrier to more efficiently serve a shipper already served. The Board concluded that such an operation does not

come under its jurisdiction because it does not constitute an extension of service to new territory or connection with a new carrier (decision served April 10, 2002 at 2). That decision is in no way inconsistent with the Board's decision in the *Effingham* case where the purpose and effect of the operation was to serve a new rail shipper in territory not previously served on what would be the carrier's entire line of railroad. See decision served April 10, 2002 at 1, note 1. The *Effingham* case applies to the facts before the Board here, not the decision in Finance Docket No. 34081.

4. Accordingly, the petition for rejection of the notices of exemption should be denied.

B. Reply to Supplement re Revocation of Exemptions

1. Sound Transportation (Supplement at 15-16)

There is no showing in UTU's Supplement that regulation of the transaction at issue is necessary to carry out the rail policies of 49 U.S.C. § 10101(4) and (5) in favor of a sound rail transportation system and sound economic conditions in transportation. Early decisions expressing concern about potential favoritism in division of rates, car-hire and demurrage are no longer applicable. UP as the delivering and receiving line-haul carrier is responsible for car-hire and is entitled to collect and retain demurrage. See *South Carolina Rys. Com. v. Seaboard Coast L.R.*, 365 I.C.C. 274, 279 (1981). BMRC does not receive a division of the line-haul rates on the traffic at issue.

2. Efficiency (Supplement at 17-18)

There is no showing in UTU's Supplement that regulation of the transaction at issue is necessary to carry out the rail policies of 49 U.S.C. §§ 10101(3) and (9) in favor of promoting an

efficient rail transportation system by allowing rail carriers to earn adequate revenues and encouraging honest and efficient management of railroads. The transaction at issue has little to do with adequate revenues and honest-efficient management. No evidence is presented that the transaction would have any effect on UP's revenues, nor that BMRC's management is not honest or efficient. The rail policies of §§ 10101(3) and (9) are not aimed at the relative and debatable efficiencies of the former UP operation vis-a-vis the BMRC operation. The Board should not second-guess the shipper's choice of BMRC in that respect. There certainly is no need for a § 10901 application or a petition for exemption to consider UTU's claims of service inefficiency in the face of the shipper's choice of BMRC to provide the service in question.

3. Federal Regulation (Supplement at 18)

There is no showing in UTU's Supplement that regulation of the transaction at issue is necessary to carry out the rail policy of 49 U.S.C. § 10101(2) in favor of minimizing the need for regulatory control over the rail transportation system. The mere statement of that issue serves to undermine UTU's position. UTU is advocating more regulation (an application instead of an exemption) to determine that regulation of the transaction is not required. UTU's real contention here is that the transaction is not properly subject to regulation. That contention has been answered in our response to UTU's petition for rejection of the notice of exemption.

4. Entry (Supplement at 18)

There is no showing in UTU's Supplement that regulation of the transaction at issue is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101(7) in favor of reducing regulatory barriers to entry into the rail industry. Here, too, mere statement of the issue undermines UTU's position. By virtue of its petition for revocation, UTU's is advocating more

regulation (an application instead of an exemption) to determine that regulation of the transaction should be reduced. That position is contradictory. Of course, UTU's real contention is that the transaction should not be subject to regulation at all. That contention has been answered in response to UTU's petition for rejection of the notice of exemption.

5. Energy Conservation (Supplement at 18-19)

There is no showing in UTU's Supplement that regulation of the transaction at issue is necessary to carry out the rail policy of 49 U.S.C. § 10101(14) in favor of energy conservation. In considering a petition to revoke an exemption, the Board's analysis focuses on sections of the rail transportation policy related to the underlying statutory section for which the exemption was granted. *Missouri Pac. R. Co. -- Aban. Exempt. -- Counties in Okla.*, 9 I.C.C.2d 18, 25 (1992). Relative locomotive fuel usage is not a material consideration in determining whether an acquisition and operation of a rail line is inconsistent with public convenience and necessity under 49 U.S.C. § 10901. Consequently, the Board is not to revoke an exemption from § 10901 on the ground that locomotive fuel usage may have been better under UP's operation of the line than under BMRC's operation.

6. Wages, Safety and Working Conditions (Supplement at 19)

There is no showing in UTU's Supplement that regulation of the transaction at issue is necessary to carry out the rail policy of 49 U.S.C. § 10101(11) in favor of fair wages and safe and suitable working conditions in the rail industry. That rail policy has limited application in determining whether an acquisition and operation is inconsistent with public convenience and necessity under 49 U.S.C. § 10901. By virtue of the ICC Termination Act of 1995, effective January 1, 1996, subsection (c) of that statute was amended to preclude the imposition of labor

protective conditions in noncarrier acquisition and operation transactions. Consequently, an adverse effect on employees is no longer a material consideration in determining whether a § 10901 transaction or exemption therefrom should be authorized. That being the case, an exemption from § 10901 is not to be revoked on the ground that it may have an adverse effect on employees. From the standpoint of safety, there is no support for UTU's contention that BMRC's operation would be subject to a lesser standard of safety than the former UP operation.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated herein and in BMRC's Reply in Opposition to Petition to Reject and/or Revoke Exemption, filed March 15, 2002, UTU's Petition as supplemented should be denied.

Respectfully submitted,

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DUE DATE: May 16, 2002

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2002, I served the foregoing document, Reply In
Opposition To Supplement To Petition To Reject And/Or Revoke Exemption, on Gordon P.
MacDougall, 1025 Connecticut Avenue, Washington, DC 20036 by UPS overnight mail.

David C. Dillon tm

David C. Dillon