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Re: Finance Docket Nos. 34179 & 34145

Dear Mr. Williams:

Enclosed please find an original and ten copies of Bulkmatric Railroad Corporation's Reply In Opposition To Petition For Reconsideration, for filing with the Board in the above referenced matter.

Very Truly Yours,

A handwritten signature in cursive script, appearing to read "David C. Dillon".

David C. Dillon,
Attorney for Bulkmatric
Railroad Corporation

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Public Record

(ORIGINAL)

BEFORE THE
SURFACE TRANSPORTATION BOARD



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

FINANCE DOCKET

NO. 34145 - 206946

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

FINANCE DOCKET

NO. 34179 - 206 945

**REPLY IN OPPOSITION
TO PETITION FOR RECONSIDERATION**

BULKMATIC RAILROAD CORPORATION
9 East Lockerman Street
Dover, DE 19901

Applicant

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Public Record**

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DUE DATE: December 30, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

BULKMATIC RAILROAD	)	
CORPORATION -- ACQUISITION	)	FINANCE DOCKET
EXEMPTION -- BULKMATIC	)	NO. 34145
TRANSPORT COMPANY	)	
	)	
BULKMATIC RAILROAD	)	
CORPORATION -- OPERATION	)	FINANCE DOCKET
EXEMPTION -- BULKMATIC	)	NO. 34179
TRANSPORT COMPANY	)	



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REPLY IN OPPOSITION
TO PETITION FOR RECONSIDERATION

Pursuant to 49 C.F.R. § 1104.13(a), BULKMATIC RAILROAD CORPORATION (BRC) hereby files this reply in opposition to the Petition for Reconsideration ("Pet.") filed by Joseph C. Szabo for and on behalf of United Transportation Union-Illinois Legislative Board (UTU-IL) on December 9, 2002.^{1/}

FOREWORD

The Petition for Reconsideration constitutes UTU-IL's third iteration of essentially the same arguments against the exemptions at issue.^{2/} Inasmuch as BRC has responded to those arguments twice, the present reply will be brief. In addition to the reply argument below, BRC

^{1/} The Petition is filed under 49 C.F.R. § 1115.3 (Pet. at 1). It should have been filed as a petition to reopen under 49 C.F.R. § 1115.4. The Board's decision served November 19, 2002 is administratively final, having become effective on the date of its service (decision at 7). However, the standards under §§ 1115.3 and 1115.4 are essentially the same, i.e., material error, new evidence, or substantially changed circumstances.

^{2/} (1) Petition to Reject and/or Revoke and for Stay of Exemption, filed March 4, 2002; (2) Supplement to Petition to Reject Notice and/or to Revoke Application of Class Exemption, filed May 1, 2002; and (3) Petition for Reconsideration, filed December 9, 2002.

hereby adopts by reference the arguments made in its (1) Reply in Opposition to Petition for Stay, filed March 5, 2002; (2) Reply in Opposition to Petition to Reject and/or Revoke Exemption, filed March 15, 2002; and (3) Reply in Opposition to Supplement to Petition to Reject and/or Revoke Exemption, filed May 16, 2002.

REPLY ARGUMENT

I. Reply re Alleged Factual Errors (Pet. at 7-10)

The Petition alleges that the decision contains "important" factual errors that "are relevant to decision" (Pet. at 7). In fact, the factual errors asserted are technical and insubstantial.

A. Caption (Pet. at 7-8)

The minor error in the caption of the decision is insubstantial. No party or potential party could have been misled by the minor error. The proceeding has been pending for over ten months. BRC and UTU-IL are the only parties. Both parties know what is sought to be exempted in the proceeding, without regard to the caption in the decision. The minor error is harmless.

B. Operation (Pet. at 8-9)

It has been clear from the outset of the proceeding that BRC seeks an exemption for its operation of the Chicago Heights trackage. Although the Board's reference to "operation over" that trackage may have been technically incorrect, the Board was not using the latter phrase as a term of art. BRC sought an exemption for operation. That is what the Board granted. Any erroneous reference to operation over the trackage was not prejudicial.

C. Chicago Heights Switching Company (Pet. at 9-10)

Contrary to UTU-IL's contention, the BRC-CHSC Operating Agreement specifically provides for CHSC's operation as agent of BRC:

- "WHEREAS, CHSC desires to operate and maintain the Chicago Heights trackage for the provision of rail service in the name of, and in behalf of, BMRC" (Agreement at 1);
- "CHSC will furnish a properly trained and qualified locomotive engineer and railroad switchman (collectively operating crew) to provide railroad switching service as agent of BMRC and in the name of BMRC at the Bulkmatic Distribution Center, Chicago Heights, Illinois (work site)" (Agreement, Appendix 2 at 1).

The more general provision cited by UTU-IL (Section 12.04 at 7) was an unintended carryover from the earlier BMC-BTC Agreement (Section 7). It is clear that the specific provisions cited above that establish an agency relationship take precedence over the more general unintended provision in Section 12.04.

There was no error by the Board in failing to mention the exemption for common control of CHSC and another rail carrier. The decision does not grant an exemption to CHSC.

II. Reply re the Martz Statement (Pet. at 10)

The Martz statement should not be received into evidence. The facts stated in the first three numbered sections of the Martz statement are not relevant in any way to the issue of whether the exemptions at issue should be revoked. Neither do those facts constitute new evidence. All of those facts could have been submitted in UTU-IL's Supplement to Petition to

Reject Notice and/or to Revoke Application of Class Exemption, filed May 1, 2002 (nearly a month after BRC began operations).

The facts in numbered section 4 of the Martz statement constitute new evidence, but they are wholly irrelevant to the issue of revocation or rejection of the exemptions. Loss of overtime pay by employees of a rail carrier displaced by a new rail carrier operation is not a relevant consideration under 49 U.S.C. § 10901. Congress has made a specific determination that labor protection is not warranted under that statute. 49 U.S.C. § 10901(c). Consequently, an application under 49 U.S.C. § 10901 cannot be required in order to carry out the national rail policy in favor of fair wages in the railroad industry under 49 U.S.C. § 10101(11) on the ground that an exemption from § 10901 would result in loss of overtime for employees of a rail carrier displaced as a result of the exemption.

III. Reply re Line-Of-Railroad Determination (Pet. at 10-14)

A. Effingham (Pet. at 10-13)

The Board's determination that the Chicago Heights trackage as proposed to be operated by BRC constitutes a line of railroad under 49 U.S.C. § 10901 rather than excepted track under 49 U.S.C. § 10906 is unquestionably correct under the purpose-and-effect qualification of the intended use test. That principle was correctly applied in *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, 1998 STB LEXIS 253. The Board's application of that principle was upheld on judicial review as a reasonable interpretation of the pertinent statutes. *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606 (7th Cir. 1999). UTU-IL was the petitioner on judicial review in that case. The Board's application of the principle was thoroughly

explained in its decision in this proceeding (at 5 and notes 12-14). The issue is no longer open to question.

Despite UTU-IL's criticism (Pet. at 11-12), it is legally correct, as stated in the decision (at 2), that a rail carrier's only trackage cannot be excepted track under § 10906 inasmuch as excepted track is necessarily incidental to a rail carrier's other track. *See Texas Central Bus. Lines Corp. -- Oper. Exempt. -- Midtexas International Center*, 2002 STB LEXIS 555 (STB Finance Docket No. 33997, decision served Sept. 20, 2002). It is not meaningful that some rail carriers may not have obtained authority or an exemption for their initial rail operation. (Pet. at 11-12). It may well be that those rail carriers were not aware of the legal requirement to do so.

B. Intended Use (Pet. at 13)

The Board found only that the purpose-and-effect qualification of the intended use test is dispositive where, as here, a noncarrier embarks on its initial rail operation. That finding has judicial endorsement. *United Transp. Union v. Surface Transp. Bd.*, *supra*. The Board did not find nor imply that the intended use test is dispositive in all other fact situations.

C. Common Carrier (Pet. at 13-14)

In order to be a common carrier, a carrier must hold itself out to serve the general public. The carrier need not be actually serving multiple shippers as long as there is the essential holding out. The evidence supports the Board's finding (decision at 4) that BRC is a common carrier as that term is properly understood.

IV. Reply re Revocation

The standard for revocation is statutory, i.e., whether "application in whole or in part of a provision of this part to the person, class or transportation is necessary to carry out the

transportation policy of section 10101 of this title." 49 U.S.C. § 10502(d). The Board correctly paraphrased that standard (decision at 6), and correctly applied it in denying the petition to revoke the exemptions (*id.* at 6-7). That is enough for denial of UTU-IL's petition for reconsideration of the revocation decision.

The Board's discussion of section 10901(c) in the context of the Village of Palestine decision (decision at 6) correctly related to the sections of the rail transportation policy implicated by the petition to revoke the exemptions. Contrary to UTU-IL's allegation (Pet. at 14-15) that discussion was not intended as a standard for revocation, and was not applied as such.

Contrary to UTU-IL's allegation (Pet. at 15), § 10502(d) does not command revocation "if () further study is needed." Revocation may be ordered if regulation is necessary to carry out a rail policy of § 10101. The "study" referred to was as to whether BRC's operation would be less efficient than the prior operation of the Chicago Heights trackage (decision at 9, note 16). The relative efficiency of those operations is wholly irrelevant under 49 U.S.C. § 10901 and under any rail transportation policy implicated by that statute.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Petition for Reconsideration should be denied.

Respectfully submitted,


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Applicant

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Attorney for Applicant

DUE DATE: December 30, 2002

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2002, I served the foregoing document, Reply In Opposition To Petition For Reconsideration, on Gordon P. MacDougall, Esq., 1025 Connecticut Avenue, N.W., Washington, DC 20036 by UPS overnight mail.


David C. Dillon