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2 February 2004

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

210016

ENTERED
Office of Proceedings

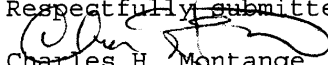
FEB - 4 2004

Re: City of Venice -- Abandonment Exemption ^{Part of} Public Record
AB 863X

Dear Mr. Williams:

Enclosed for filing please find an original and ten copies of a Reply to TRRA's Motion for Reconsideration as filed in this proceeding. Thankyou for your assistance in this matter.

Respectfully submitted,


Charles H. Montange
for City of Venice

Encls

cc. counsel for TRRA per cert. serv.

210016

BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET AB 863X

CITY OF VENICE

-- ABANDONMENT EXEMPTION --

BETWEEN BRANCH STREET YARD, MO
AND MCKINLEY JUNCTION, IL

ENTERED
Office of Proceedings
FEB -4 2004
Part of
Public Record



REPLY TO MOTION TO RECONSIDER

Terminal Railroad Association of St. Louis (TRRA) has moved to reconsider the Notice of Exemption issued pursuant to 49 C.F.R. § 1152.50 (two year out of service exempt abandonments) authorizing exempt abandonment in this case in favor of City of Venice. TRRA asserts that City of Venice has no common carrier obligations to abandon. For the reasons stated below and in City's prior filings, TRRA is incorrect.

1. It is indisputable that City of Venice acquired all interests in the two-mile railroad line at issue in this proceeding from Illinois Terminal Railroad in 1958. Similarly, it is indisputable that Illinois Terminal did not retain any railroad easement. Instead, Illinois Terminal agreed to continue to operate over the line pursuant to a document dated 14 October 1958 entitled "Railroad Agreement." That agreement provided for a lease-like arrangement.

In general, a party (such as City of Venice) acquiring a rail line to be operated by another acquires a common carrier obligation. This does not mean that only the acquiring party

holds the obligation, and not the operator. To the contrary, both hold an obligation. As this Board's predecessor explained in Industrial Dev. Corporation -- Exemption from 49 U.S.C. Subtitle IV, F.D. 30558, Nov. 4, 1984, 1984 ICC Lexis 154 at *3, that

"when a non-operating carrier owns a line of railroad and a third-party carrier provides service on that line, we have ordinarily treated both owner and operator as a common carrier."

As more specifically relevant here, and as set forth in City's response to TRRA's December 29 "comments,"

"This Board's predecessor (ICC) has emphasized that when a state or local government acquires an operating rail line, it is presumed to succeed the prior owner in terms of ensuring discharge of the common carrier obligation over the line. See Common Carrier Status of States, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Indeed, in Southern Pacific Transportation Company -- Abandonment Exemption -- Los Angeles County, CA, AB 12 (Sub-no. 139X), 8 ICC2d 495 (1992), this Board quoted with approval the result in City of Austin, TX -- Acquisition-- Southern Pacific Transportation Company, F.D. 30861(A), served Nov. 4, 1986. There the Commission held that Austin "assumed a common carrier obligation, even though it did not intend to operate the line itself, because by acquiring full ownership of the line it necessarily assumed responsibility for contracting with, and ensuring continued service by, a rail operator."

See also Onondaga County Industrial Development Agency-- Acquisition and Operation Exemption -- Lines of Consolidated Rail Corporation, F.D. 32287, served July 7, 1994 (sale to public agency with leaseback to carrier, held, the public agency assumed a common carrier obligation to ensure service).

2. In City's Notice of Exemption, City noted that Norfolk & Western Railroad (the successor to Illinois Terminal) had

already successfully terminated its common carrier obligation over this two-mile line of railroad as part of the abandonment authorization emanating from docket AB 290 (sub-no. 139X). But City of Venice did not participate in that proceeding. Since City of Venice has not received an abandonment authorization for the common carrier obligation which the cases cited in the first numbered paragraph above indicate that City of Venice has, City of Venice filed the proceeding here to obtain such an authorization through procedures permitted under 49 C.F.R. § 1152.50 (two-year out of service abandonments). This is the same procedure which was employed by Norfolk & Western in AB 290 (sub-no. 139X). City became aware of its unterminated common carrier obligation in the course of preparing to transfer ownership of the McKinley Bridge to the Illinois Department of Transportation or its nominee. The McKinley Bridge, which is part of the rail line in question here, was previously used for both rail and motor vehicular traffic. The McKinley Bridge currently can be used for neither purpose due to deteriorated condition. The bridge needs to be renovated in order to serve residents of the City of Venice and other persons seeking transit into and out of St. Louis. The renovation plans for the McKinley Bridge do not contemplate continued railroad use. In order to expedite those plans (and transfer of the Bridge for renovation), it is important that City's rail common carrier obligations be terminated.

3. TRRA objects that certain elevated railroad structures

(which TRRA suggests are on property for which TRRA is the fee owner) serving as the rail approaches to the McKinley Bridge are deteriorated. TRRA seems to imply that this is evidence that the line is de facto abandoned. City of Venice agrees that the wooden trestles are deteriorated. However, even if this constituted de facto abandonment, it is not relevant to show that City of Venice has no common carrier obligation. The law is clear that "a rail carrier may not abandon a rail line without [ICC/STB] approval." State of Vermont and Vermont Rwy., Inc. -- Discontinuance of Service Exemption, 3 ICC2d 903, 1987 ICC Lexis 229 at *7, citing Gibbons v. United States, 660 F.2d 1227, 1233-34 (7th Cir. 1981). The fact that track is missing does not mean that some entity with a common carrier obligation on the line may treat the common carrier obligation as abandoned. In the words of the ICC,

"If our jurisdiction could be terminated by de facto abandonment, then out of service lines could be abandoned without regulatory approval and the exemption [49 C.F.R. 1152.50] would be unnecessary. Even if the track is physically removed, as here, neither the carrier's common carrier obligation or the agency's jurisdiction is terminated. The Commission can, and has on occasion, ordered carriers to restore such lines when there is a request for service. See, e.g., Akron & B.B.R.Co. -- Abandonment of Operations, 239 ICC 250 (1940)."

State of Vermont, supra, 1987 ICC Lexis 229 at *8. City of Venice accordingly may not treat its residual common carrier obligation as "abandoned" merely because the trestle has deteriorated. Instead, City properly must seek abandonment authority in order to permit removal of the structures, and to ensure that the McKinley Bridge renovation may move forward

without thwarting this agency's jurisdiction.

4. TRRA objects that there is a line of cases commencing with Maine DOT, 8 I.C.C.2d 835 (1991), under which local and state governments may acquire railroad property without acquiring a common carrier obligation. However, these cases admonish the agencies involved to seek prior approval, or an exemption from regulation. Otherwise the presumption is that the local or state government acquiring a rail line also acquires a common carrier obligation. Onondaga County Industrial Development Agency -- Acquisition and Operation Exemption -- Lines of Consolidated Rail Corporation, F.D. 32287, served July 7, 1994. Many state and local agencies are prepared to acquire a common carrier obligation, even if they intend to rely exclusively on another entity as operator of the rail line. Shippers frequently regard this as a good thing for it provides further assurance of service. Id. In other words, even under current cases, the fact that an agency may qualify for an exemption from common carrier obligations or a determination of non-common carrier status does not mean that it must be regarded as lacking such status, even where it acquires a rail line and condescends to such status. The "default" position under the case law is that a party acquiring a rail line acquires a common carrier obligation, even if the party contracts with another to operate the line.

5. TRRA cites Illinois Term. R.Co., 327 ICC 70 (1958), as approving the 1958 sale by Illinois Terminal to City of Venice.

TRRA intimates the 1958 decision somehow determines that Venice has no common carrier obligation. In the 1958 case, Illinois Terminal sought approval of its transaction on the ground that there was no change in common carrier obligations and that the transaction was therefore outside the jurisdiction of the Commission. If the ICC had adopted this theory, then TRRA's claim that City of Venice did not acquire any common carrier obligations would have some weight. But TRRA's reliance is misplaced. Although ICC allowed the transaction, the Commission pointedly rejected Illinois Terminal's theory that ICC lacked jurisdiction over the transaction. To the contrary, ICC found that the transaction did impact Illinois Terminal's common carrier obligation.¹ Nothing in the 1958 decision holds that City has no residual common carrier obligation as owner of the rail line, nor does the proceeding grant an exemption to the City. Indeed, it appears that the City either was not a party to the proceeding; if the City was a party, the City evidently did not request any determination that it lacked common carrier status, or if it did, its request was ignored or not granted.

¹ Illinois Terminal sought a determination that the transaction by which it transferred its interests in the two-mile line of railroad at issue here was outside the Commission's jurisdiction. If Illinois Terminal had been granted what it sought, then maybe TRRA would be correct in its arguments. However, ICC pointedly rejected Illinois Terminal's position. 327 ICC at 71. ICC instead held that due to loss of control over the property by Illinois Terminal, the railroad had to obtain prior approval from ICC before entering into the transaction. 327 ICC at 74-75. ICC viewed the transaction as analogous to a situation in which a railroad abandoned its line in favor of a parallel track over another common carrier. 327 ICC at 74.

6. In conclusion, under this Board's precedent, the City, as owner of the two-mile rail line has a common carrier obligation.

7. TRRA's only remaining argument is that City is somehow not qualified to seek an abandonment authorization under 49 C.F.R. § 1152.50 because City is not a railroad. Under the Commerce Act, Revised Commerce Act, and ICCTA, a party may be a "carrier" or "railroad" even if it is not incorporated as a railroad, and even if it does not intend to operate.² A non-operating common carrier may still employ exemption procedures. TRRA in effect is arguing that a city or state government which owns a rail line and has a common carrier obligation on that line must file an adverse abandonment application to authorize abandonment of the common carrier obligation it has over the line which it owns. This makes no sense, for the City is not acting adversely to itself in seeking to abandon an obligation which it understands itself to have as to property it owns. Adverse abandonment applications are employed if a party other than the party holding the common carrier obligation seeks the abandonment authorization. If Norfolk & Western still had common carrier obligations extant on the property, and if the City wished to terminate those, then the City would have to file an adverse abandonment application as to the Norfolk & Western

² There are many examples of companies which are not incorporated as railroads, as well as individuals, who employ "offer of financial assistance" procedures (currently embodied in 49 U.S.C. § 10904) to acquire railroad lines.

obligations. However, Norfolk & Western has already terminated its common carrier obligations, and the City seeks only an authorization terminating the residual obligations which the City possesses by reason of its acquisition of the rail line in 1958.

8. In response to remaining arguments by TRRA, City of Venice believes them essentially the same as in TRRA's December 29 "Comments." City of Venice hereby adopts herein its Reply to TRRA's December 29 Comments, which appears on STB's website under the January 26 "filings."³

³ TRRA in its Petition at p. 4 cites North Carolina Ports Authority, F.D. 34258, and South Orient Railroad Company, F.D. 31971, for the proposition that City of Venice has no residual common carrier obligation. But in those cases, the government agency involved sought a prior determination that it would not have any common carrier obligation, and had previously negotiated arrangements with the operators of the rail property at issue with this in mind. Here Venice did not obtain a prior determination, and Illinois Terminal's claim that the Commission lacked jurisdiction was rejected. Illinois Term. R.Co., 327 ICC 70 (1958). TRRA in effect seems to be seeking a reconsideration of ICC's 1958 decision, but the doctrine of repose suggests that one should not attempt retroactively to rewrite decisions. In any event, TRRA is making the classic mistake of treating an authorization as mandatory when it instead is only permissive. The fact that parties to certain transactions desire and obtain exemptions or jurisdictional determinations does not mean that parties to all similar transactions must be treated as exempt or the transactions as non-jurisdictional even if they do not wish it.

TRRA, while acknowledging that lessors of rail lines have been held to have residual common carrier obligations (TRRA Pet. Recon at p. 5), cites Wisconsin Central Ltd. v. STB, 112 F.3d 881 (7th Cir. 1997) for the proposition that "no residual common carrier obligations exist when the leased property is not a rail line." TRRA Pet. at 5. But the property owned by City of Venice always encompassed an operating rail line. The property in question in Wisconsin Central had been lawfully abandoned for regulatory purposes by its owner. Some years later, the abandoned property was leased to another railroad for operation. Although ICC/STB viewed the lease as rekindling the

9. This Board stayed the effective date of the Notice of Exemption (January 28) in this proceeding in an order issued January 26. The stay contained no discussion of the factors which the Board must find as a basis for a stay. City of Venice continues to be of the view that none of the factors have been met here, for reasons stated herein and in our prior pleadings. Allowing the Notice of Exemption to become effective will clarify that there is no common carrier obligation extant on this line. This allows dismantlement of the deteriorated wooden structures which TRRA asserts "harm" it (but concerning which TRRA has evidently taken no action to date). Moreover, allowing the Notice of Exemption to become effective will facilitate the McKinley Bridge rehabilitation. It is in the public interest to permit the McKinley Bridge project to move forward. For this reason, the City is expediting the filing of its reply to TRRA's petition for reconsideration.

Conclusion

Consistent with applicable precedent, TRRA's petition for reconsideration should be denied.

owner's abandoned common carrier obligation, the court held this was error. However, the court pointedly distinguished the situation of an abandoned rail line from cases involving operating rail lines. 112 F.3d at 891 n.6 & n.7. In any event, insofar as relevant here, the October 14, 1958 "Railroad Agreement" between Illinois Terminal and City of Venice grants Illinois Terminal operating rights (subject to the terms of the Agreement) on the "Line of Railroad" owned by the City. The parties regarded the property sold to encompass a railroad line, and it was an operating railroad line.

Respectfully submitted,



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for City of Venice

Certificate of Service

I hereby certify that copies of the foregoing were posted by U.S. Mail, postage pre-paid, first class or equivalent, on 2 February 2004, upon Fritz Kahn, 1920 N Street, NW (8th Fl.), Washington, D.C. 20036-1601 and Rebecca R. Jackson, Bryan Cave LLP, 211 No. Broadway (36th Fl.), St. Louis, MO 63102. The foregoing was also faxed to Mr. Kahn on that date.

