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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Docket No. 863X

CITY OF VENICE
- ABANDONMENT EXEMPTION -
IN VENICE, IL, AND ST. LOUIS, MO

REPLY
OF
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS



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TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

Dated: February 11, 2004

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Terminal Railroad Association of St. Louis ("TRRA"), pursuant to leave granted by the Board, replies to the Reply of the City of Venice ("Venice"), filed February 3, 2004, in response to TRRA's Petition for Reconsideration, as follows:

1. TRRA's Petition for Reconsideration charged Venice with having filed a Notice of Exemption containing false or misleading information and asked the Board to reject the Notice of Exemption summarily.
2. By its Notice of Exemption, Venice falsely represented that it is a rail carrier entitled to avail itself of the two-year-out-of-service class exemption of 49 C.F.R. 1152.50. Venice, however, is not, and never has been, a rail carrier and, accordingly, cannot abandon a railroad line which it currently does not, and heretofore did not, own or control.

3. At page 1 of its Reply, Venice maintains that it became a rail carrier as a result of the

sale-and-lease-back of the right-of-way and its improvements by the Illinois Terminal Railroad Company, approved by the Interstate Commerce Commission ("ICC") by its Decision in Illinois Term. R. Co. Abandonment, 327 I.C.C. 70 (1958). According to Venice's Reply, it acquired all of the Illinois Terminal Railroad Company's interests in the two-mile railroad line between the Branch Street Yard in St. Louis, Missouri, and McKinley Junction near Venice, Illinois. Venice completely misrepresents the tenor of the ICC's decision and the agency's findings. In the 1958 proceeding, Illinois Terminal Railroad Company contended that no ICC abandonment authorization was required, because the railroad would continue to render service as a rail carrier on the line between St. Louis and Venice. The ICC, however, believed that, since the railroad was relinquishing title to certain of its assets, the agency's abandonment authorization was required. Nevertheless, the ICC had no illusions about which entity would continue to be the railroad vested with the rights to operate the line. The ICC, 327 I.C.C. at 71, noted, "The applicant states its operations and service between, in, and through St. Louis and Venice will continue to be provided and maintained without any interruption whatsoever, and there is no intention on the part of the applicant to abandon, in any respect, its service or operations presently existing." In short, pursuant to the Railroad Agreement with Venice, Illinois Terminal Railroad Company retained in perpetuity the sole authority to render service as the rail carrier on the line between St. Louis and Venice. Venice may have purchased the right-of-way and its improvements; it, however, did not acquire the franchise to operate the line, which was the Illinois Terminal Railroad Company's alone.¹

¹ At page 6 of its Reply, Venice further distorts the ICC's holding in the proceeding. The ICC authorized the abandonment, because the Illinois Terminal Railroad Company sold its right-of-way and improvements to Venice and not because the applicant in any way relinquished its

4. At page 1 of its Reply, Venice implies that it became a rail carrier by virtue of its lease of the right-of-way and its improvements to Illinois Terminal Railroad Company. As it said, "In general, a party (such as City of Venice) acquiring a rail line to be operated by another acquires a common carrier obligation." The flaw in Venice's analysis is that it did not acquire a rail line from Illinois Terminal Railroad Company but only the railroad's right-of-way and its improvements. Venice could not have operated on the railroad line between St. Louis and Venice even if it had wanted to. Venice was nothing more than a noncarrier lessor of the right-of-way and its improvements. As the Supreme Court declared in California v. Southland Royalty Co., 436 U.S. 519, 543 (1978), quoting with approval from Meyers v. Famous Realty, Inc., 271 F.2d 811, 814 (2nd Cir. 1959), cert. den., 362 U.S. 910 (1960), "[A] noncarrier, by merely leasing its properties to a carrier, [does not become] a 'carrier by railroad,' thus subjecting itself to an obligation to carrier on the operations of its lessee's railroad . . . "

5. Venice's claim that it became a rail carrier on the line between St. Louis and Venice as an outcome of the 1958 proceeding fails to square with the fact that Venice was not even a party to the proceeding, as Venice acknowledges, at page 3 of its Reply. It is difficult to conceive how Venice could have acquired a railroad line and become a rail carrier in an ICC proceeding in which it was not an applicant and did not otherwise participate.

6. The law is unmistakable that one cannot become a rail carrier without applying for, and obtaining from the Board, the requisite authority, pursuant to 49 U.S.C. 10901 or an exemption

status as a rail carrier. Venice misrepresents the ICC's determination in stating, "ICC found that the transaction did impact Illinois Terminal's common carrier obligation [footnote omitted]." The ICC's Decision contained no such finding. To the contrary, the ICC entertained no doubt that the Illinois Terminal Railroad Company would continue to be the rail carrier on the line between St. Louis and Venice.

therefrom.² As the Board observed in Class Exemption--Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd sub nom., Illinois Commerce Com'n v. I.C.C., 817 F.2d 145 (D.C. Cir. 1987), "Noncarriers require Commission approval under section 10901 to acquire or operate a rail line in interstate commerce."

7. The predecessor provision, 49 U.S.C. 1(18), which was in effect in 1958, imposed a similar requirement. In part, section 1(18) provided, "[N]o carrier by railroad subject to this part . . . shall acquire or operate any line of railroad . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the . . . operation . . ." In Iowa Term. R. Co. Acquisition and Operation, 312 I.C.C. 546, 548 (1961), the ICC explained, "[W]here a noncarrier desires to acquire and operate a railroad, the provisions of section 1(18) of the act requiring any person or corporation to obtain a certificate thereunder before engaging in railroad operations is applicable." Further along in its Decision, the ICC, 312 I.C.C. at 549, stated, "We have consistently entertained applications by noncarrier corporations, under section 1(18), proposing to engage in railroad operations." Accord, Monessen S. W. Ry. Co. Operation, 217 I.C.C. 181, 190 (1936) ("[I]n 1920 Congress entered the field of regulation with respect to changes in railroad status, etc. with the result that no railroad now may be placed in interstate status as of right but only with the authorization required by section 1(18) of the act."); Great Northern Pac. Ry. Co. Acquisition,

² In Finance Docket No. 32287, Onondaga County Industrial Development Agency--Acquisition and Operation Exemption--Lines of Consolidated Rail Corporation, served July 7, 1994, cited by Venice at pages 2 and 5 of its Reply, and Southern Pacific Transportation Company--Abandonment Exemption--Los Angeles County, 8 I.C.C.2d 495 (1992), cited by Venice at page 2 of its Reply, the public authorities became rail carriers by exemptions from 49 U.S.C. 10901 approved by the Board.

162 I.C.C. 37, 46 (1930)("Under section 1(18) of the act, in many instances we have issued certificates of public convenience and necessity permitting corporation organized for the purpose of engaging in transportation by railroad, but not so engaged, to operate existing lines."). Venice at no time applied for, or was granted, a certificate of public convenience and necessity to become a rail carrier, and Venice in its Reply does not contend otherwise. Venice could not become a rail carrier by the mere purchase of the Illinois Terminal Railroad Company's right-of-way and improvements of the line between St. Louis and Venice, as Venice seems to suggest, at page 1 of its Reply. Without having applied for and having obtained from the ICC the requisite authorization to be a common carrier railroad, pursuant to section 1(18) of the Interstate Commerce Act, Venice cannot have become the rail carrier it claims to be.³

8. At page 7 of its Reply, Venice advances the strawman argument that TRRA contended in its Petition for Reconsideration that Venice is not, and never has been, a rail carrier because "it is not incorporated as a railroad." Venice fails to cite to the page in TRRA's Petition where that statement supposedly appears. In fact, that is an allegation which TRRA at no time has made.

9. Finally, at page 2 of its Petition for Reconsideration, TRRA accused Venice of having filed a Notice of Exemption that contained false or misleading information in failing to disclose that the railroad line between St. Louis and Venice in fact long has been abandoned by the Norfolk and Western Railroad Company ("N&W"), pursuant to the Decision and Notice of

³ At page 5 of its Reply, Venice totally misapprehends the holding of Maine DOT-Acq. Exemption, Me. Central R. Co., 8 ICC 835 (1991), and the many cases which have followed it. The public bodies in those proceedings did not acquire railroad lines, as Venice contends, but simply the rights-of-way and improvements on which the conveying railroads permanently and irrevocably continued to render service as rail carriers. It was the very fact that the public bodies did not acquire railroad lines that led the Board and, before it, the ICC to conclude that the transactions did not require the agency's approval.

Interim Trail Use or Abandonment in Docket No. AB-290 (Sub-No. 139X), Norfolk and Western Railway Company—Abandonment Exemption—In Madison and St. Clair Counties, IL, and the City of St. Louis, MO, served April 25, 1994. At pages 2 and 8 of its Reply, Venice determined to take a different tack and now concedes that the N&W indeed had abandoned the railroad line between St. Louis and Venice. If, as is the case, N&W previously abandoned the railroad line, it is unfathomable how Venice expects the Board to approve its present abandonment proposal. Once a railroad line has been abandoned and no railroad operations have been performed on it in the meantime, it stands to reason that the line cannot be abandoned a second time. Yet, Venice evidently believes the railroad line between St. Louis and Venice, which has been unused since the N&W abandoned it several years ago, again can be abandoned.. Venice's Notice of Exemption has no other purpose, and, since it is an altogether impermissible filing, the Notice of Exemption should be rejected. ⁴

⁴ TRRA at no time has contended that there as been a *de facto* abandonment by Venice of the railroad line between St. Louis and Venice, as Venice contends, at page 4 of its Reply. In the view of TRRA, Venice does not, and never has had, a railroad line to be abandoned by it, whether *de facto* or pursuant to a Notice of Exemption. Vermont & VT Ry.—Discontinuance—Crittenden Co., VT 3 I.C.C.2d 903 (1987), cited by Venice for the proposition and the Board does not countenance *de facto* abandonments, is inapposite.

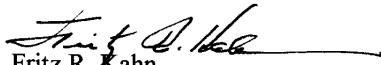
WHEREFORE, Terminal Railroad Association of St. Louis asks that the Notice of Exemption of the City of Venice be rejected for containing false or misleading information.

Respectfully submitted,

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

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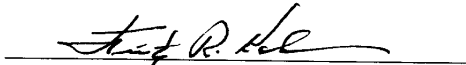

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Dated: February 11, 2004

CERTIFICATE OF SERVICE

I certify that I this day have served the foregoing Reply upon the City of Venice and Madison County Transit by facsimile transmitting copies thereof to its representatives.

Dated at Washington, DC, this 11th day of February 2004.


Fritz R. Kahn