

2 10599

INDIANA SOUTHWESTERN RAILWAY CO.

1318 SOUTH JOHANSON ROAD • PEORIA, ILLINOIS 61607 • (309) 697-1400

April 14, 2004



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

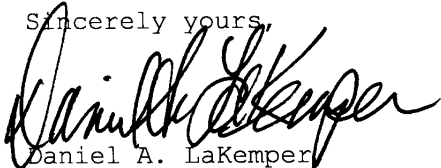
RE: Ohio Valley Railroad Company - Acquisition & Operation
FD No. 34486

Dear Secretary Williams:

Enclosed, for filing, are an original and ten copies of Indiana Southwestern Railway's Petition to Reject/Revoke, or Stay the above-referenced Notice of Exemption. Also enclosed is an extra copy, which I ask that you file-stamp and return to me at the above address.

Please call me if you have any questions.

Sincerely yours,


Daniel A. LaKemper
General Counsel.

Enclosures.

ENTERED
Office of Proceedings
APR 15 2004
Part of
Public Record

210599

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34486

OHIO VALLEY RAILROAD COMPANY

-ACQUISITION AND OPERATION EXEMPTION-

HARWOOD PROPERTIES, INC.

PETITION TO REJECT OR REVOKE
PETITION TO STAY

EXPEDITED HANDLING REQUESTED

INDIANA SOUTHWESTERN RAILWAY CO.

Daniel A. LaKemper, Esq.
General Counsel
1318 S. Johanson Road
Peoria, Illinois 61607
Tel.: (309) 697-1400
Fax: (309) 697-8486

Dated: April 14, 2004.

ENTERED
Office of Proceedings

APR 15 2004

Part of
Public Record



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34486

OHIO VALLEY RAILROAD COMPANY
-VERIFIED NOTICE OF EXEMPTION-
HARWOOD PROPERTIES, INC.

PETITION TO REJECT OR REVOKE
PETITION TO STAY



Comes now INDIANA SOUTHWESTERN RAILWAY CO. ("ISW"), and respectfully requests that the Board reject or revoke, *ab initio*, the Verified Notice of Exemption filed by Ohio Valley Railroad Company in Finance Docket No. 34486, and, in the alternative, to Stay the Exemption, pending the Board's full consideration of the pleadings in this proceeding.

On March 23, 2004, Ohio Valley Railroad Company ("Ohio Valley") filed a Verified Notice of Exemption with the Board seeking to change the status of certain private yard tracks owned by Harwood Properties, Inc., in Evansville, Indiana, from industrial track operations in a private yard to common carrier operation.

The only justification given for this change of status is that Mid America Locomotive & Car Repair, Inc. ("Mid America"), which ISW believes is the current lessee of the property (and sole rail user), "requested" the change.

The Board should summarily reject the Notice on the grounds that (1) it does not describe a transaction that falls within the scope of 49 U.S.C. §10901, (2) Ohio Valley's purpose in making the filing – Mid America "has requested that" Ohio Valley "establish common carrier service," is not a proper purpose for class exemption

procedures and is an abuse of the Board's regulatory procedures, and (3) The Notice fails to meet the requirements of 49 C.F.R. §1150.33, and is materially misleading.

In the alternative, the effective date of Ohio Valley's exemption should be stayed, pursuant to 49 C.F.R. §1150.35(f), pending the Board's establishing a procedural schedule in this proceeding. As set forth below, this Petition to Stay the Exemption satisfies each of the four standards used by the Board in determining the merits of a Stay Petition.

I. Background

According to the Verified Notice of Exemption, Harwood Properties, Inc., a non-carrier, intends to lease certain private yard tracks currently being operated a industrial tracks, in Evansville, Indiana, to Ohio Valley Railroad Company. Ohio Valley claims that these tracks total 2.8 miles, but they have no mile posts, and are described only as "tracks 4 through 11 and connecting tracks in Harwood Yard". The status of Mid-America Locomotive & Car Repair, Inc. is not disclosed, but ISW is informed and believes that Mid-America currently occupies the shop and office building, and uses the yard tracks described in the Notice. ISW believes that Mid-America currently leases the subject property. Although the Notice refers to "other shippers", the Letter filed April 7, 2004 in response to Comments filed by CSX Transportation, Inc., admits that Mid-America is the only current shipper. Mid-America is currently a customer of ISW, which would be Ohio Valley's only common carrier connection. It would seem, on the surface, therefore, that Mid-America is requesting the insertion another switch carrier into its routings, for reasons left unstated.

ISW operates approximately 21.9 miles of railroad in Vanderburgh and Posey Counties, Indiana (See FD 33859, Served March 28, 2000). The ISW portion of Harwood Yard is adjacent to the proposed Ohio Valley portion of Harwood Yard. The ISW portion is, of course, except for the mainline, excepted yard trackage, even under ISW common carrier ownership and operation.

Ohio Valley makes no attempt to demonstrate any change in the character of rail operations that would warrant a change in status of this trackage. Even if the “additional shipper” which Ohio Valley is allegedly in “active negotiations with” becomes an actual shipper, Ohio Valley admits it will also be within the confines of the yard.

In passing, ISW notes that it would seem the Notice should more appropriately be for “Lease and Operation” rather than “Acquisition and Operation”

II. The Verified Notice of Exemption is Defective on its Face and Should be Summarily Rejected or Revoked, *ab initio*.

A. THE NOTICE DOES NOT DESCRIBE A TRANSACTION SUBJECT TO 49 U.S.C. §10901.

Ohio Valley filed the Notice pursuant to 49 C.F.R. §1150.31, which sets forth the class exemption procedures for exempt transactions under 49 U.S.C. §10901. The Board has jurisdiction under §10901(a) over the following types of transactions:

A person may -

- (1) construct an extension to any of its railroad lines;
- (2) construct an additional railroad line;

(3) provide transportation over, or by means of, an extended or additional railroad line; or

(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line; only if the Board issues a certificate authorizing such activity.

The Notice does not describe the construction of a railroad line, the provision of transportation over an extended or additional railroad line or the acquisition or operation of a railroad line by a noncarrier. Instead, it proposes to substitute another carrier for the authorized common carrier currently serving one customer on excepted, private yard trackage. It fails to offer any rational basis for this substitution and change of status, or demonstrate what purpose is served by creating a common carrier yard.

Indeed, 49 C.F.R. §1150.33, which describes the information to be contained in a Notice of Exemption, provides at Subsection (e)(1), that the Notice state “The name and address of the **railroad** transferring the subject property [emphasis added]”. The Notice attempts to ignore that issue, by stating “The name and address of the **party** transferring the Rail Lines is Harwood Properties, Inc. [emphasis added]”. While ISW concedes that the exemption process is available in some cases in which a noncarrier is transferring the property, the burden of showing that the exemption is available, is on the entity claiming the exemption. Merely substituting words for those used in the regulation is not, we submit, an adequate showing.

B. THE BOARD HAS PREVIOUSLY HELD THAT A CHANGE OF LEGAL STATUS OF A RAIL LINE OR OPERATIONS THEREON CANNOT BE CONDUCTED UNDER THE CLASS EXEMPTION PROCEDURES.

The Board has previously considered whether the class exemption procedures in Subpart D may be used to change the legal status of a railroad line. In Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA, Finance Docket No. 34252 (Served December 5, 2002), the Board rejected UP's attempt to change the status of 6.3 miles of excepted industrial trackage. The Board held that, in order to change the legal status of trackage, the proposed carrier has the burden of demonstrating that the trackage has acquired the required indicia of regulated common carrier trackage. "If the line is used for loading, unloading, storage, switching, or other purposes incidental to transportation service, it is excepted trackage under section 10906." In that particular proceeding, the Board held that UP did "not meet its burden of demonstrating how its use of the Port trackage has changed so that it now falls within section 10901."

Ohio Valley makes no effort to demonstrate that its operations will change the character of its portion of Harwood Yard, nor does it make any effort to distinguish the operations in its yard from those being conducted in hundreds of other private yards all over the country.

Similarly, in Jefferson Terminal Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc., Finance Docket No. 33950 (Served March 19, 2001), the Board found that a purchaser of certain track could not use the class exemption procedure as a shield against a condemnation action by a municipality. The Board found that:

"The class exemption procedures were adopted to serve shipper and community interests by facilitating continued rail service, on lines that the selling carrier could no longer operate profitably, by new, smaller carriers seeking to provide service more efficiently [citation omitted]. The procedures were not intended to apply to cases in which a noncarrier seeks to convert what could be non-rail property into a rail line."

Further, the Board stated that “We will not permit our processes to be misused” in such a manner.

In Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.; Riverview Trenton Railroad Company – Petition for an Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI. Finance Docket No. 33980 and 34040 (Served February 15, 2002), the Board also found that the transaction at issue was not within the scope of the class exemption procedures, in part because it “would convert private carrier operations into for-hire common carrier service”. The Board was concerned that “such a conversion triggers this agency’s primary jurisdiction, thus withdrawing the service and the property over which it operates from many aspects of local control”

ISW, and its sister railroads, have been and remain strongly supportive of broad federal preemption of state and local regulation of common carrier railroads. Such preemption is critical to the competitive viability of the rail industry in an environment in which other modes are heavily subsidized. That having been said, the Board has shown its awareness of the potential for the abuse of preemption, and has properly refused to condone it.

Ohio Valley having failed to provide any rational for interjecting another carrier into Mid-America’s routings, ISW is hesitant to speculate. ISW is, however, informed and believes that Mid-America is in the business of storing and repairing locomotives and railcars, and is also in the construction business. Obviously, Mid-America is currently subject to various state and local regulations. It is difficult to imagine any legitimate purpose for this Notice. Simply the desire to be a common carrier is clearly insufficient. One has to meet the standards of actually being a common carrier.

C. THE NOTICE DOES NOT MEET THE REQUIREMENTS OF 49 C.F.R. §1150.33, AND IS MATERIALLY MISLEADING.

While the requirements of a Notice of Exemption are not extensive- and are, intentionally, not burdensome – there nevertheless are requirements to be met.

Subsection (d) requires that the Notice state “The Operator of the property”. Ohio Valley’s Notice does not clearly do so.

Subsection (e) requires a brief summary of the transaction. ISW submits that the statements in the Notice are both inadequate and misleading. In the first place the Notice indicates a lease will be negotiated (although the caption is “acquisition and operation” not “lease and operation”), and it refers to a 9.808 acre property, “including the shop and office building”. ISW is informed and believes that the shop and office are currently occupied by Mid-America, which is not a common carrier, nor will it become a common carrier if this Notice becomes effective. The yard tracks are also currently used by Mid-America. Without any terms being disclosed from this apparently as yet unconcluded lease, (nor is there any time schedule proposed, as required by Subsection (e)(2)), it is very difficult to determine what the respective positions of Ohio Valley, Mid-America and Harwood Properties, Inc., will be.

Subsection (e)(3) and (4) require mile posts and route miles. The Notice admits there are no mileposts. It then substitutes total length of all tracks (allegedly 2.8 miles) for “route miles.” These measurements are not, of course, the same. Common carrier route miles do not include the length of excepted sidings, passing tracks, industrial tracks, and the like. The Notice, by including all of the track miles in the yard, tacitly admits

that there is no way to logically divide the yard tracks. They are all excepted private yard tracks. There are no route miles.

Finally, Subsection (f) requires “A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States.” While the Board may not require the most elaborate map, the topographical map included in the Notice fails to show any termini or stations. It is impossible to determine where Ohio Valley’s tracks begin or end, or where Ohio Valley would interchange with ISW (which owns and operates many of the tracks depicted on the map).

While in part misleading, the Notice taken in its totality, simply fails to meet the requirements of the Exemption, or to demonstrate the barest elements of a common carrier rail line.

D. THE VERIFIED NOTICE OF EXEMPTION SATISFIES THE STANDARD FOR REJECTION.

The Notice, on its face, fails to describe a transaction that meets the requirements of the class exemption. The Board’s predecessor granted a petition to reject a Notice of Exemption in West Side Rail Line Development Foundation, Inc. – Exemption – Purchase of a Portion of the West 30th Street Secondary Track in New York, NY, Finance Docket No. 30795 (Served April 10, 1986), not because of any false or misleading statement, but rather because the transaction failed to meet the standards of the class exemption.

The precedents are clear in this situation. The Notice should be similarly rejected.

III. The Four Criteria for Issuance of a Stay are Satisfied.

In the event the Board does not reject the Notice summarily, it should stay the effective date pursuant to 49 C.F.R. §1150.35(f).

The four standards to be considered in determining whether to grant a stay are:

- (1) that there is a strong likelihood that the movant will prevail on the merits;
- (2) that the movant will suffer irreparable harm in the absence of a stay;
- (3) that other interested parties will not be substantially harmed; and
- (4) that the public interest supports the granting of the stay.

See Bulkmatic Railroad Corporation – Acquisition and Operation Exemption – Bulkmatic Transport Company; Bulkmatic Railroad Corporation – Operation Exemption – Bulkmatic Transport Company, Finance Docket Nos. 34145 and 34179 (Served March 5, 2002).

This Petition meets those standards.

There is a strong likelihood that ISW will prevail on the merits of this proceeding. Recent decisions of the Board are unequivocal in their holdings as to the use of the class exemption for changing the legal status of rail property. Ohio Valley's Notice is defective on its face, and utterly fails to make the feeblest attempt to meet the burden necessary to change the legal status of private yard trackage.

ISW will suffer irreparable harm if the Board does not grant the stay, as, potentially, will CSX, which has already filed comments expressly its concern about the Exemption. ISW, and almost assuredly, other carriers, including CSX, would, if the Exemption becomes effective, be forced to include Ohio Valley in traffic routings, and accord Ohio Valley and status of a carrier. ISW would have to allocate scarce yard space for "interchange" purposes, and would have to EDI cars to Ohio Valley, which could potentially create numerous problems for not just ISW and other carriers, but for

shippers, car owners, and others, in the event the Notice is, as it probably will be, ultimately revoked, *ab initio*.

No interested party will be substantially harmed by granting the stay. Again, CSX has already made their misgivings known and asked the Board to “closely review the actual proposal to determine if it will actually become a common carrier, or will merely be a new entity providing a non-common carrier service” (See Letter filed March 26, 2004). Likewise, no cognizable harm will come to any other party because, from a rail operations standpoint, this Notice changes nothing. It is purely a legal change.

The public interest also supports the granting of the stay. The public interest is served by protecting the integrity of the regulatory process. The public interest is served by maintaining the proper legal status and continuity of the rail system. The public interest not served by temporary creation, and then elimination, of common carriers.

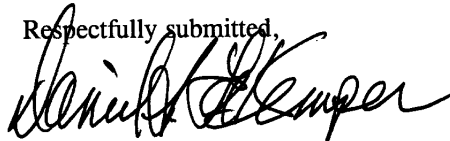
Since allowing this Notice to become effective would change only the legal status of the operation – not the actual rail operation itself – it would be prudent to maintain the status quo. This was the position the Board took in Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA, Finance Docket No. 34252 (Served November 8, 2002), and ISW respectfully suggests the Board should follow that precedent in this case, if it determines that further proceedings are necessary.

IV. CONCLUSION

This Notice of Exemption serves no legitimate purpose. This is not even a close case. It is clear on the face of the Notice that this is merely an attempt to turn a private yard into a common carrier railroad, without any showing that it meets the qualifications of common carrier rail service. It is the same sort of abuse of the class exemption process that the Board has repeatedly refused to condone.

The Notice should be summarily rejected, or, at least, stayed, pending the Board's review of the matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel A. LaKemper", written over the typed name.

Daniel A. LaKemper, Esq.
General Counsel
Indiana Southwestern Railway Co.
1318 S. Johanson Road
Peoria, Illinois 61607
Tel.: (309) 697-1400

VERIFICATION

I, Scott Isonhart, Secretary of Indiana Southwestern Railway Co., verify under penalty of perjury that I have read the above and foregoing Petition to Reject/Revoke or Stay; that I have knowledge of the facts stated therein; and that those facts are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file the foregoing document.

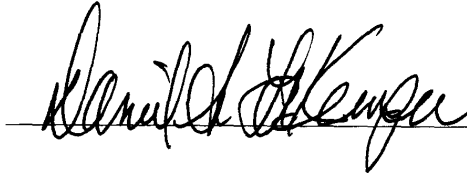
Scott L. Isonhart

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served by sending it via UPS Next Day Air courier service, all charges paid, this 14th. Day of April, 2004, to the following:

Richard R. Wilson, Esq.
Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219-2383

Louis E. Gitomer
Ball Janik, LLP
1455 F Street, N.W.,
Suite 225
Washington, D.C. 20005

A handwritten signature in black ink, appearing to read "Daniel D. Kenger", is written over a horizontal line.