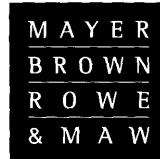


211366



June 18, 2004

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

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JUN 18 2004

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Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel (202) 263-3000
Main Fax (202) 263-3300
www.mayerbrownrowe.com

Robert M. Jenkins III
Direct Tel (202) 263-3261
Direct Fax (202) 263-5261
rmjenkins@mayerbrown.com

Re: STB Finance Docket No. 34514
Raritan Central Railway, L.L.C. -- Operation
Exemption -- Heller Industrial Parks, Inc.

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of "Petition to Stay Exemption," which is being filed jointly by Consolidated Rail Corporation (Conrail), Norfolk Southern Railway Company (NS), and CSX Transportation, Inc. (CSXT). Please date-stamp the extra copy that is enclosed and return it to our representative.

Please be advised that the Notice of Exemption that Conrail, NS, and CSXT seek to stay is scheduled to become effective on June 22, 2004. Counsel for Conrail contacted counsel for Raritan Central Railway, L.L.C. (Raritan), concerning a voluntary stay pending revocation proceedings. Counsel for Raritan declined to agree to such a stay. The parties did agree, however, that the effective date of the exemption be postponed to June 24, 2004, to provide time for Raritan to respond to the enclosed stay request.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "RMJ".
Robert M. Jenkins III

RMJ/bs

Enclosures

cc: John D. Heffner
David M. Konschnik
Joseph H. Dettmar
Jonathan M. Broder
John V. Edwards
Paul R. Hitchcock



BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34514
RARITAN CENTRAL RAILWAY, L.L.C.
-- OPERATION EXEMPTION --
HELLER INDUSTRIAL PARKS, INC.

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EXPEDITED ACTION REQUESTED

PETITION TO STAY EXEMPTION

John V. Edwards
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510
(757) 629-2838

Attorney for Norfolk Southern Railway
Company

Paul R. Hitchcock
CSX TRANSPORTATION, INC.
500 Water Street J150
Jacksonville, FL 32202
(904) 359-1192

Attorney for CSX Transportation, Inc.

Jonathan M. Broder
CONSOLIDATED RAIL CORPORATION
2 Commerce Square, 29th Floor
2001 Market Street
Philadelphia, PA 19101
(215) 209-5020

Robert M. Jenkins III
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3261

Attorneys for Consolidated Rail Corporation

Dated: June 18, 2004



BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34514

RARITAN CENTRAL RAILWAY, L.L.C.
-- OPERATION EXEMPTION --
HELLER INDUSTRIAL PARKS, INC.

EXPEDITED ACTION REQUESTED

PETITION TO STAY EXEMPTION

Raritan Central Railway, L.L.C. ("Raritan") on June 15, 2004, filed a Verified Notice of Exemption to acquire exclusive operating rights to approximately two miles of track and right of way in Edison Township, New Jersey, that is currently operated by Consolidated Rail Corporation ("Conrail"). Norfolk Southern Railway Company ("NS") and CSX Transportation, Inc. ("CSXT") also currently have the right, pursuant to the Board's decision in the Conrail Control proceeding, to operate their own trains over this track, which serves several shippers. *See CSX Corp., Et Al. – Control and Operating Leases/Agreements – Conrail, Inc., Et Al.*, 3 S.T.B. 196, 228 (1998).

Conrail, NS, and CSXT intend to file a petition under 49 U.S.C. § 10502(d) to revoke the exemption sought by Raritan. However, under the Board's rules, a petition to revoke does not automatically stay an exemption. *See* 49 C.F.R. § 1150.41(c). Thus, absent a stay of the exemption, Raritan's Notice would ordinarily become effective seven days after it was filed, on

June 22.¹ Although Raritan does not intend to begin operations until August 15, proceedings on a petition to revoke are unlikely to be completed before then. The upshot is that Raritan will have apparent authority from the Board to operate the rail line as a common carrier without any determination having been made by the Board that the line is jurisdictional and, if so, that Conrail, CSXT, and NS may lawfully be evicted from the line.² Furthermore, it is unclear from Raritan's petition whether Raritan is seeking the right not only to operate over trackage owned by a third party, Heller Industrial Parks, Inc., but also to operate over trackage owned by Conrail.³ Whatever right Raritan may ultimately be found to have to operate over trackage owned by Heller Parks, it cannot assert any right to operate over Conrail trackage absent an agreement with Conrail, which it does not have.

Petitioners submit that all of the criteria for a stay are met in this case. Those criteria are (1) irreparable harm absent a stay, (2) likelihood of success on the merits, (3) no substantial harm to other interested parties, and (4) the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843. Regarding irreparable harm, Petitioners have no ability to stop the effectiveness of the exemption without a stay. That means that Raritan will have apparent authorization from the

¹ Counsel for Conrail contacted counsel for Raritan on June 16, 2004, the day after Raritan's Notice was filed, to request Raritan's agreement to a voluntary stay. Counsel for Raritan agreed to extend the effective date of its Notice by two days, until June 24, to provide time for Raritan to reply to Petitioners' stay request, but declined to agree to a stay pending revocation proceedings.

² Raritan's counsel asserted in a letter faxed to Conrail on June 17, 2004, a copy of which is attached hereto, that it "has executed a license agreement giving it the exclusive right to provide rail service at this facility [Heller Industrial Park] as of August 15, 2004, replacing service presently provided by Conrail" and that it had filed a notice of exemption at the STB "in order to initiate this service."

³ There is no way to determine from the information in Raritan's Notice, including the maps, exactly what tracks are included in its exemption petition.

Board to provide exclusive common carrier service to the shippers within the Heller Industrial Park in Edison Township without any determination having been made by the Board that Conrail, CSXT, and NS can be forced off the line. Petitioners could be denied access to their customers and forced to suspend direct service without any Board authorization. This untenable situation can only be avoided by a stay to permit the Board to address the question of whether the agreement between Raritan and Heller Parks makes Raritan a common carrier and whether the terms of that agreement can be enforced without the Board's authorization of "adverse abandonment" against Conrail, CSXT, and NS.

Regarding likelihood of success on the merits, as the Board is well aware, neither Conrail nor any other railroad is authorized to discontinue common carrier service to shippers over a jurisdictional line, even when the operating agreement that originally gave it access to the line has expired or been terminated. *See Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 144-45 (1946) ("*Tex-Mex*"). In this case, Conrail has received a letter from Heller Parks that would terminate the existing operating agreement between Conrail and Heller Parks on or about August 1, 2004. (It is unclear how Heller Parks believes that shippers within the industrial park will be served between August 1 and August 15, 2004.) Assuming that the track at issue is jurisdictional track over which the Board has abandonment authority, the law is clear that Conrail cannot be forced off the line without the issuance of an "adverse abandonment" certificate. *See Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*, 8 I.C.C.2d 773 (1992), *aff'd sub nom. Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994). Absent such an agreement, if the parties cannot reach agreement on the terms of the tenant's continued operation of the track, the Board will set the new terms. *See, e.g., Atchison, Topeka & Santa Fe Ry. – Operating Agreement – Southern*

Pacific Co., 331 I.C.C. 367 (1967), *modified*, 333 I.C.C. 342 (1968); *North Carolina R.R. – Petition to Set Trackage Compensation and Other Terms and Conditions – Norfolk Southern Ry.*, F.D. No. 33134 (served May 29, 1997).

Raritan asserts in its Notice (at 3) that Conrail “serves the subject trackage as an industrial spur.” Notice at 3. If it were just a spur, however, the Board would have no regulatory authority over the line, 49 U.S.C. § 10906, and Raritan would have no need to seek Board authorization to provide common carrier service over the line. Permitting the accuracy of Raritan’s assertion about the nature of the line to go untested by the Board would be to permit Raritan and Heller Parks to progress a potential adverse abandonment without complying with the Board’s regulations and the relevant public interest considerations inherent in those regulations. There are several active shippers on the line. Furthermore, as the second of the three maps attached as Exhibit A to Raritan’s Notice makes clear, there are facilities in the area for many more shippers, which Conrail, CSXT, and NS are currently also entitled to serve. Finally, as the same map makes clear, the principal lines serving the facility (nos. 229 and 231) are distinct lines from the numerous shipper leads (nos. 768-780) fed by those lines. These are all indicia of a jurisdictional line over which common carrier service is provided. *See Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983).⁴

Admittedly, the determination of what is or is not jurisdictional track is extremely fact-specific. *See, e.g., Illinois Commerce Comm’n v. United States*, 779 F.2d 1270 (7th Cir. 1985).

Petitioners are handicapped at this stage by their lack of access to the relevant agreements

⁴ Indeed, line 229 is Conrail’s Raritan Industrial Track, which Conrail owns and which serves many more shippers than just those at Heller Park. Its inclusion on the map, along with shipper lead nos. 768-770 and the portion of line 231 that is owned by Conrail, raises the question whether Raritan believes it has obtained authorization to operate over Conrail track – which Heller Parks obviously has no authorization to grant Raritan.

between Raritan and Heller Parks, between Heller Parks and the shippers, and between Raritan and the shippers. It may be that after a revocation proceeding in which the parties have had the opportunity for discovery, the Board may determine that this track is not jurisdictional. But if it is not jurisdictional, then no Notice of Exemption and common carrier authority is required for Raritan. No *Tex-Mex* requirements will attach that bind Raritan to the track. Raritan will have neither the obligations nor the benefits of common carrier status. It will simply be acting as a contract switcher that can be replaced in accordance with its contract.⁵

Regarding substantial harm to other parties, there is nothing to suggest that Raritan, Heller Parks, or any of the shippers served by the line in question will suffer any substantial injury as a result of maintaining the status quo pending the results of a revocation proceeding. Petitioners have received no complaints regarding service in the area, and Conrail is prepared to continue providing service under the same conditions during the revocation proceeding.

Regarding the public interest, it clearly will be served by a stay. The Board should resolve the question of whether the line in question is jurisdictional, requires common carrier

⁵ Petitioners are aware that the Board at times has held that track may be jurisdictional for one railroad but not for another, either because the railroad in question is putting the track to different use than the other railroad, *see Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718, 727 (D.C. Cir. 1996), or because the track constitutes all of the track of the railroad, *see Texas Central Business Line Corp. – Operation Exemption – MidTexas International Center*, STB Finance Docket No. 33997 (served Sept. 20, 2002). Obviously, however, not all rail operations in industrial parks constitute common carrier operations, and they certainly do not become so by mere assertion. The facts and circumstances in the particular case determine whether common carriage is involved. In this case, there is no suggestion in Raritan's Notice that it will be providing any different service than Conrail, and, as the Notice itself makes clear, this trackage would by no means constitute the entirety of Raritan's track. Raritan is already a Class III carrier with operations elsewhere. Its operation at Heller Park would not connect with its other operations, but would be a separate switching operation. If running a separate switching operation were enough to make a railroad a common carrier subject to STB licensing requirements, then every contract switcher in the country would have to obtain authority from the STB to conduct its operations. That has never been the law.

authorization to operate, and is subject to the *Tex-Mex* doctrine and other benefits and burdens of common carrier service on an adequate record – not presumptively on the basis of a seven-day Notice.

Respectfully submitted,

John V. Edwards
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510
(757) 629-2838

Attorney for Norfolk Southern Railway
Company

Paul R. Hitchcock
CSX TRANSPORTATION, INC.
500 Water Street J150
Jacksonville, FL 32202
(904) 359-1192

Attorney for CSX Transportation, Inc

Dated: June 18, 2004

Jonathan M. Broder
CONSOLIDATED RAIL CORPORATION
2 Commerce Square, 29th Floor
2001 Market Street
Philadelphia, PA 19101
(215) 209-5020



Robert M. Jenkins III
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3261

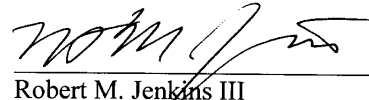
Attorneys for Consolidated Rail Corporation

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Petition to Stay Exemption" have been served this 18th day of June 2004, by fax or first-class mail, upon the following persons:

John D. Heffner, Esq.
John D. Heffner, PLLC
1920 N Street, NW
Suite 800
Washington, DC 20036

Ellen M. Carpenter
Vice President
I. Heller Construction Co., Inc.
205 Mill Road
Edison, NJ 08837


Robert M. Jenkins III

ATTACHMENT

JOHN D. HEFFNER, PLLC
1920 N ST., N.W.
SUITE 800
WASHINGTON, D.C. 20036
(202) 263-4180
FAX (202) 296-3989
j.heffner@verizon.net

BY FAX AND MAIL
856- 231-2002

June 17, 2004

Mr. Ronald L. Batory
President and Chief Operating Officer
Consolidated Rail Corporation
Room 400
1000 Howard Blvd.
Mt. Laurel, NJ 08054

RE: Raritan Central Railway, L.L.C.

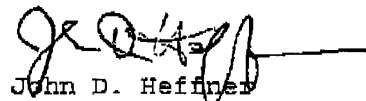
Dear Mr. Batory:

I am writing you at the request of my client, Raritan Central Railway, L.L.C., to request that Conrail enter into an agreement for the interchange of traffic with Raritan Central at the Heller Industrial Park, Edison, NJ.

As you may be aware, Raritan Central has executed a license agreement giving it the exclusive right to provide rail service at this facility as of August 15, 2004, replacing service presently provided by Conrail. Yesterday, Raritan Central filed its notice of exemption at the Surface Transportation Board in order to initiate this service.

Raritan Central looks forward to working with Conrail on an orderly transition of service.

Sincerely yours,


John D. Heffner

cc: Jonathan Broder, Esq.
Mr. Eyal Shapira