

BEFORE THE
SURFACE TRANSPORTATION BOARD

ORIGINAL

211663
ORIGINAL

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



PETITION TO REVOKE EXEMPTION

REPLY OF RARITAN CENTRAL RAILWAY, L.L.C.

ENTERED
Office of Proceedings
JUL 27 2004
Part of
Public Record

ORIGINAL

Respectfully submitted,

John D. Heffner
John D. Heffner, PLLC
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 263-4180

Its counsel

Dated: July 27, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

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



PETITION TO REVOKE EXEMPTION

REPLY OF RARITAN CENTRAL RAILWAY, L.L.C.

INTRODUCTION

On July 7, 2004, Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT"), and Norfolk Southern Railway Company ("NS") (collectively "Petitioners") jointly filed a "Petition to Revoke Exemption" in the above-captioned proceeding. Respondent Raritan Central Railway, L.L.C. ("Raritan") files this reply urging the Board to deny Petitioners' requested relief.

BACKGROUND
AND STATEMENT OF FACTS

On June 15, 2004, Raritan, an existing class III short line railroad, originally filed a verified notice of exemption under the procedures of 49 CFR 1150.41 seeking to operate a one mile long segment of track owned by Heller Industrial Parks, Inc.¹

¹ On July 12, 2004, the Board served a decision exempting Raritan's proposed operation.

Thereafter, on June 18, 2004, Petitioners asked the Board to stay Raritan's exemption on the grounds that Conrail operated the track as industrial, switching, or spur trackage exempt from STB entry regulation under the provisions of 49 U.S.C. 10906. By decision served June 25, 2004, the Board denied Petitioners' request. On July 7, 2004, Petitioners filed the instant Petition to Revoke Exemption.

ARGUMENT

There is no basis for granting Petitioners' request. Under 49 U.S.C. 10502(d), the Board (as with the Interstate Commerce Commission before it) may revoke an exemption, in whole or in part, "when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title. Thus, the standard for revoking an exemption is whether regulation is needed to carry out the rail transportation policy. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted." See, Minnesota Comm. Ry., Inc.-Trackage Exempt.- BN RR. Co., 8 I.C.C.2d 31, 35-7 (1991) (cited as Minnesota) and cases cited therein; Class Exemption-Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 801, 812 (1985); and STB FD No. 34145, Bulkmatic Railroad Corporation-Acquisition and Operation

Exemption-Bulkmatic Transport Company (decision served November 19, 2002).

Moreover in determining that a transaction is one requiring regulation and therefore revocation of an exemption, the Board applies the two part test of section 10502: first, does the transaction satisfy one or more of the 15 rail transportation policy goals articulated at section 10101a of the Board's governing statute, the I.C.C. Termination Act ("the Act")? Second, does the transaction satisfy either element of the second part of section 10502 in that involves a matter of limited scope or there is no opportunity for abuse of captive shippers?

In response to Petitioners' revocation request, Raritan has searched their Petition for some basis for the relief sought and has found none.² While Petitioners offer two overlapping arguments, neither satisfies the statutory burden for imposing regulation. They are:

- This case raises substantial factual and legal issues that merit, in Petitioners' words, a "more searching process" - whether by individual petition for exemption or full application - than is possible in a 7-day notice proceeding under 49 CFR section 1150.41. The issues which Petitioners claim require "a more searching process" include whether Raritan will operate the track as an unregulated "contract switcher" or a common carrier and whether Raritan's common carrier

² The only case [Jefferson Terminal R.R. Co. - Acquisition and Operation Exemption, et al] cited by Petitioners at page two of their Petition in support of its argument that "a more searching process" is needed is distinguishable. That case involved a short line start up request opposed by a city and involving potential preemption issues. Raritan's transaction does not involve these issues.

operation of the track could lead to the creation of a "bottleneck carrier" claimed to eliminate the two carrier competition said to exist today under Conrail.

- This case presents the issue of whether the track which is the subject of this proceeding is "jurisdictional" track subject to the Board's licensing power under 49 U.S.C. 10901 or 10902 or intrastate spur, switching, or industrial trackage exempt from STB entry or exit regulation under 49 U.S.C. 10906.

Responding to Petitioners' assertions, Raritan reviewed precedent for Board or Interstate Commerce Commission exemption revocation. While cases revoking exemptions on substantive grounds are comparatively few and far between, they tend to fall into three broad categories none of which Petitioners' allege exist here. First, the STB and the ICC have on occasion revoked an exemption where the challenger had successfully established a need for regulation. See, FD No. 32407, Transloaders, Inc. - Lease And Operation Exemption -- F&L Realty, (decision served April 22, 1994) (cited as Transloaders); and STB No. 34484, James Riffin D/B/A The Northern Central Railroad - Acquisition And Operation Exemption - in York County, PA, And Baltimore County, MD (decision served April 20, 2004). Such petitions must be based upon reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. See, FD No. 31102, Wisconsin Central Ltd.-Exemp. Acq. & Oper.-Certain Lines of Soo L.R. Co. (decision served July 28, 1988). Second, the STB and ICC have also revoked an exemption where the notice contained information alleged to be false or misleading. Transloaders,

supra. Finally, the STB and the ICC have stated that they retain the right to review a transaction to protect the integrity of their administrative processes and to prevent sham transactions. See, Minnesota, supra; STB FD No. 33389, The Land Conservancy of Seattle and King County - Acquisition And Operation Exemption, Et Al (decision served Sept. 26, 1997); and STB FD No. 33995, SF&L Railway, Inc.-Acquisition and Operation Exemption-Toledo, Peoria and Western Railway Corporation Between LaHarpe and Peoria, IL (decision served October 17, 2002).

Analyzing Petitioners' request by that standard, Petitioners have neither shown nor alleged that Raritan's notice contains false or misleading information, that it has in any way abused the STB's procedures, or seeks to undertake a sham transaction. The only allegation is an asserted need for some unspecified regulation. Furthermore, Petitioners have not shown specifically how the transaction would adversely affect the competition-related goals of section 10101a's rail transportation policy. Nor have Petitioners questioned the transaction's limited impact or shown any opportunity for abuse of captive shippers. Indeed, one customer and the operator of Heller Park filed statements supporting Raritan's exemption.

Turning to Petitioners' arguments, there is no need for the Board to require Raritan to seek authorization for the transaction by means of a formal application or an individual

petition for exemption. The Board has on numerous occasions entertained requests for start up authority for short line railroads seeking to operate as a class III common carrier railroad lines formerly operated as "exempt trackage." See, e.g., Effingham RR Co.-Pet. For Declaratory Order, 2 S.T.B. 606 (1997), aff'd sub. nom. United Transp. Union v. Surface Transp. Bd., 183 F.3d 606 (7th Cir. 1999), STB Docket No. 33997, Texas Central Business Lines Corporation - Operation Exemption - MidTexas International Center (decision served September 20, 2002), and STB Docket No. 34018, Yolo Shortline Railroad Company - Acquisition and Operation Exemption - County of Sacramento, CA (decision served March 27, 2001). Despite the fact that some of these were controversial, it found no need to require processing under more formal procedures. STB Docket No. 34392, New Jersey Rail Carrier, LLC - Acquisition and Operation Exemption - Former Columbia Terminals, Kearney, NJ (decision served August 13, 2003). To the extent the Board needs to explore and consider issues raised by Petitioners here it can do so utilizing the existing notice of exemption procedures. Id.

Thus, this proceeding boils down to two basic issues, both of which can be resolved in the current proceeding: (1) does the substitution of Raritan for Conrail result in the creation of a "bottleneck carrier" and (2) is the subject trackage a "line of railroad" or "exempt trackage" for the purpose of STB entry

regulation?

As to the first, the substitution of Raritan for Conrail does not result in a "bottleneck carrier." For a class I railroad to assert that a minuscule entrepreneur-owned operation results in a "bottleneck carrier" is so absurd that it destroys any credibility that Petitioners' arguments might otherwise have. In fact, substituting Raritan for Conrail will not in any way change the competitive balance for the two existing rail customers at the Heller Industrial Park. Customers who have access to both CSX and NS at the park today will continue to have the same access post-consummation. Any suggestion by NS to the contrary will be of its own making. Petitioners' concern seems to be over whether Raritan might price transportation interchanged with CSXT differently than that interchanged with NS, control the routing of traffic, and "demand" a division of revenues from CSXT or NS. Raritan intends to work with both CSXT and NS to handle current traffic and develop new business. As the Board knows, it is the shippers, not the railroad, that determines the routing of freight. Finally, Petitioners' suggestion that Raritan could successfully "demand" a division is nothing short of ludicrous. Although the Board could theoretically set a division, short lines rarely invoke that procedure. They know they'll be better off through negotiations with class I railroads than through administrative proceedings.

Raritan intends to work cooperatively with CSXT and NS for mutual benefit.

Regarding the regulatory status of the subject trackage, Raritan asserts that its use will convert the trackage from exempt spur, switching, or industrial track to a "line of railroad." Under the applicable law, railroad track can change from exempt to "jurisdictional" (that is, subject to STB entry and exit regulation) depending upon the use to which it is put. See, discussion in FD No. 34252, Union Pacific Railroad Company - Operation Exemption - in Yolo County, CA (slip op. served December 5, 2002 at 3-5). Unlike Conrail or its predecessors, Raritan intends to use this trackage for common carrier transportation. It will hold itself out to perform service for those present or future customers at Heller Park. Raritan will originate and terminate trains and traffic moving it interstate commerce. It will establish the Heller Park facility as a "station" for the purpose of attracting traffic and quoting or making rates.

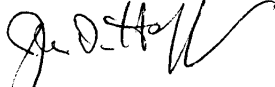
Petitioners have now concede that Heller Industrial Park has the right to terminate its agreement with Conrail and to employ Raritan to operate as a "contact switcher" in Conrail's stead. Petition to Reject at 4. In view of that development, Petitioners' continued litigation here suggests that Petitioners have some other agenda. The Board should not impose a new level

of regulation over short line start ups premised, as Petitioners would have it, on their impact on class I railroad service.

CONCLUSION

Accordingly, Petitioners have shown no basis for revocation of Raritan's exemption. They have not asserted that Raritan's notice contains false or misleading information, that their proposed operation represents a threat to the integrity of the Board's administrative processes or is a sham transaction. While they do raise the issue of the nature of the track Raritan will operate (i.e. line of railroad versus spur), that can be resolved on the present record. Finally, Petitioners make no effort to assert the "reasonable specific concerns" the Board expects of parties seeking exemption revocation.

Respectfully submitted,



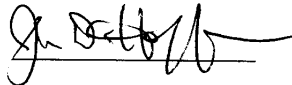
John D. Heffner
John D. Heffner, PLLC
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 263-4180

Its counsel

Dated: July 27, 2004

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have this 28th day of July 2004, served a copy of the Reply to Raritan Central Railway, LLC, upon all parties of record by 1st class United States mail and upon outside counsel for Petitioner Consolidated Rail Corporation on the 27th day of July, 2004, by fax transmission.


John D. Heffner