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August 2, 2004



VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Suite 715
Washington, DC 20423-0001

**RE: Finance Docket No. 34503, Timber Rock Railroad, Inc. --
Lease Exemption – The Burlington Northern And Santa Fe
Railway Company**

Dear Secretary Williams:

Attached for filing are the original and ten copies of the Reply To Petition To Revoke.

Please time and date stamp the extra copy of the Reply and return it with our messenger.

If you have any questions, please contact me.

Sincerely yours,

A handwritten signature in cursive script that reads 'Karl Morell'.

Karl Morell

Enclosures

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34503

TIMBER ROCK RAILROAD, INC.
--LEASE EXEMPTION--
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

REPLY TO PETITION TO REVOKE



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Attorneys for:
TIMBER ROCK RAILROAD, INC.

Dated: August 2, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34503

TIMBER ROCK RAILROAD, INC.
--LEASE EXEMPTION--
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

REPLY TO PETITION TO REVOKE



Timber Rock Railroad, Inc. ("TRRR"), hereby replies in opposition to the Petition To Revoke ("Petition") filed by the United Transportation Union ("UTU"), on July 13, 2004.

BACKGROUND

On June 24, 2004, TRRR filed a Notice of Exemption pursuant to 49 C.F.R. Part 1150, Subpart E - Exempt Transactions Under 49 U.S.C. 10902, to permit TRRR to lease 117.82 miles of rail lines from The Burlington Northern and Santa Fe Railway Company ("BNSF"). As part of the transaction, TRRR also sought to acquire incidental trackage rights over 54.72 miles of BNSF rail lines in order to interchange traffic with BNSF. The requested exemption became effective on July 3, 2004 and TRRR has consummated the transaction. On July 13, 2004, UTU filed its Petition seeking revocation of the exemption.

REPLY

The gravamen of UTU's request to have the exemption revoked is that the rail lines being leased by TRRR constitute an alternative east-west route that avoids Houston, TX and that TRRR's lease of the line will "further exacerbate" the existing "major traffic

congestion" in Houston. Petition at 1-2. As is demonstrated below, the Petition is both legally and factually misguided.

The standard for revoking an exemption is whether regulation is needed to carry out the rail transportation policy of Section 10101. 49 U.S.C. § 10502(d). Petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. *Minnesota Comm. Ry., Inc. - Trackage Exempt. - BN RR. Co.*, 8 I.C.C. 2d 31, 35-36 (1991) ("*Minnesota Comm.*"); STB Finance Docket No. 32766, *Portland & Western Railroad, Inc. -- Lease and Operation Exemption -- Lines of Burlington Northern Railroad Company* (not printed), served October 15, 1997; Finance Docket No. 31617, *Chesapeake & Albemarle R. Co. - Lease, Acq. & Oper. Exemp. - Southern Ry. Co.* (not printed), served September 19, 1991; Finance Docket No. 31102, *Wisconsin Central Ltd. - Exemp. Acq. & Oper. - Certain Lines of Soo L.R. Co.* (not printed), served July 28, 1988.

The party seeking revocation of an exemption has the burden of proving that regulation of the transaction is necessary. *Id.* Here, UTU has simply come forward with unsupported and unsupportable assertions that revocation is necessary to carry out the national transportation policy. Because UTU has submitted no evidence in support of its assertions, it has failed to meet its burden of proof and its Petition must be denied.

Where, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and, under 49 C.F.R. § 1115.3(b), must state in detail whether revocation is supported by material error, new evidence, or substantially changed circumstances. UTU has failed to address these standards much less introduce any evidence to warrant a finding under these standards.

Moreover, the Board's analysis focuses on the sections of the rail transportation policy that are related to the underlying statutory section from which the exemption was granted. *Minnesota Comm.*, at 36. The Board does not revoke exemptions "because a section of the [rail transportation policy] *unrelated to* the underlying section of the statute requires revocation. *Id.*, at 37. In addition, the Board does not extend its analysis beyond the issues that it would address in an application proceeding. *Id.*, at 36-37.

UTU quotes seven of the fifteen sections of the rail transportation policy, but fails to explain either: (1) why any of these sections compels the revocation of the exemption in this proceeding; or (2) the relevance of these sections to Section 10902(c), the underlying section of the statute.

Granting UTU's request would require TRRR to file an individual petition for exemption under Section 10502 or an application for the lease of the BNSF rail lines either under Section 10902 or Section 11323. Under Section 10902, the Board would be required to grant the application unless it finds that the lease of the BNSF lines by TRRR is inconsistent with the public convenience and necessity. Transactions initiated under Section 10902 were deemed by Congress to be consistent with the public convenience and necessity unless shown to be otherwise. *Class Exem. For Acq. Or Oper. Under 49 U.S.C. 10902*, 1 S.T.B. 95, 100 (1996).

Under Section 11324, the Board would be required to grant the application unless it finds that:

"(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.”

49 U.S.C. § 11324(d).

UTU fails to explain the manner in which TRRR's lease of the BNSF lines is inconsistent with the public convenience and necessity. Nor does UTU allege, much less demonstrate, that the TRRR lease is likely to substantially lessen competition, create a monopoly, or restrain trade in surface transportation.

The transaction involved in this proceeding is the very type of procompetitive transaction that the Board and its predecessor, the Interstate Commerce Commission (“ICC”) have repeatedly endorsed and affirmed. As the ICC noted:

“[I]t has been our experience with transactions of this type that the acquiring firm will bring new vitality to the line. Typically, the new operator has closer ties to local communities and will provide better service, often at lower rates, and will work closely with shippers on the line.”

Finance Docket No. 31089, *Montana Rail Link, Inc. - Exemption Acquisition and Operation - Certain Lines of Burlington Northern Railroad Company* (not printed), slip op. at 21, served May 26, 1988. The ICC also found no basis for concerns that permitting Class 1 railroads to divest themselves of rail lines would degrade service. *Class Exemption - Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810, 812-13 (1985). As a locally based carrier, TRRR will be able to provide more efficient, economical and attentive service to the customers on the line. To the extent TRRR's services are more efficient and economical, the transaction will lead to improved service at lower rates for existing and potential shippers.

Aside from being legally flawed, the Petition is predicated on a misunderstanding of the arrangement between TRRR and BNSF. Rather than forcing BNSF to reroute its overhead

traffic through the Houston area, the arrangement preserves for BNSF the same routing options it enjoyed before the transaction was consummated. By freeing up the crews that provided the local and certain overhead services on the leased lines and the locomotives that were utilized in these services, BNSF has gained added operating flexibility which should assist BNSF in meeting the shipping public's needs in the upcoming "peak season".

For example, BNSF retained the right to move loaded and empty unit trains in overhead movements over the leased lines in its own account with its own crews and locomotives.

Alternatively, the agreement permits BNSF to utilize TRRR's services in performing these bridge movements. Consequently, BNSF today has the same routing options it enjoyed prior to the arrangement with TRRR only today BNSF has the added option of utilizing either its own crews and locomotives or TRRR's services for overhead operations over the leased lines.

TRRR's lease of the BNSF lines will not reduce capacity in our Nation's rail network nor will it reduce BNSF's routing options in the Houston area. Prior to the lease of the lines by TRRR, BNSF had two options available to handle the military trains between Forth Worth and the Port of Beaumont: the traffic could be routed through Houston or around Houston over the leased lines. Today BNSF enjoys three options: the traffic can be routed through Houston over other BNSF lines, the traffic can be routed over the leased lines utilizing BNSF crews and locomotives, or the traffic can be interchanges with TRRR in bridge service over the leased lines. While the routing options remain the same for this and other BNSF overhead traffic, BNSF has gained operational flexibility for its crews and locomotives.

In analogous situations, the Board, the ICC and the courts have consistently held that the routing of overhead traffic is a matter of managerial discretion that requires no regulatory authorization. *See, e.g., Futurex Industries, Inc. v. ICC*, 897 F. 2d 866 (7th Cir. 1990); *People*

of State of Illinois v. ICC, 698 F. 2d 868, 873 (7th Cir. 1983) ("This policy reflects the well-established principle that the routing of overhead traffic and the selection of alternative routes for the handling of such traffic is a matter of managerial discretion."); *Central Michigan Ry. Co. – Abandonment*, 7 I.C.C. 2d 557 (1991); *Southern Pacific Transp. Co. – Abandonment*, 360 I.C.C. 138 (1979); STB Docket No. AB-406 (Sub-No. 14X), *Central Kansas Railway, L.L.C. – Abandonment Exemption – In Sedgwick County, KS* (not printed), served April 10, 2001. Consequently, before the consummation of the involved transaction, it was within BNSF's managerial discretion to route its overhead traffic over the leased lines or the lines traversing Houston. The lease of the lines by TRRR does not significantly alter BNSF's routing options.

CONCLUSION

UTU has failed to submit any evidence warranting the revocation, in whole or in part, of the exemption granted to TRRR in this proceeding. There are no provisions of Section 10101 requiring regulation of TRRR's lease of the BNSF rail lines. Moreover, the involved transaction will increase and not reduce BNSF's operating flexibility in the Houston area. Therefore, TRRR respectfully urges the Board to deny the Petition.

Respectfully submitted,



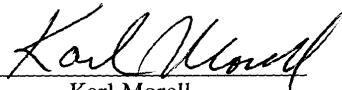
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Attorneys for:
TIMBER ROCK RAILROAD, INC.

Dated: August 2, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2004, I have caused a copy of the foregoing Reply to Petition to Revoke to be served on counsel for UTU by first-class, prepaid mail.


Karl Morell