

212128

BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

LOUIS E. GITOMER
OF COUNSEL
(202) 466-6532

lgitomer@dc.bjllp.com

October 1, 2004

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington, DC 20423

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Office of Proceedings

OCT - 4 2004

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Department

RE: Finance Docket No. 34536, *Indiana & Ohio Central Railroad, Inc.—Acquisition
and Operation Exemption—CSX Transportation, Inc.*

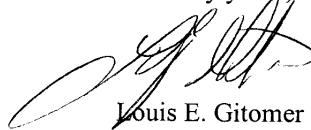
Dear Secretary Williams:

Enclosed for filing are the original and ten copies of a Response and three diskettes with the file Response.doc.

Please time and date stamp the extra copy of this letter and the Response and return them with our messenger. Thank you for your assistance.

If you have any questions, please contact me.

Sincerely yours,

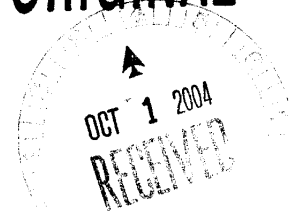


Louis E. Gitomer
Attorney for Indiana & Ohio Central
Railroad, Inc.

Enclosure



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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34536

INDIANA & OHIO CENTRAL RAILROAD, INC.— ACQUISITION AND OPERATION
EXEMPTION—CSX TRANSPORTATION, INC.

RESPONSE OF INDIANA & OHIO CENTRAL RAILROAD, INC.

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Gary A. Laakso, Esq.
Vice President Regulatory Counsel
INDIANA & OHIO CENTRAL
RAILROAD, INC.
5300 Broken Sound Blvd., NW
Second Floor
Boca Raton, FL 33487
(561) 994-6015

Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, DC 20005
(202) 638-3307

Attorneys for: INDIANA & OHIO CENTRAL
RAILROAD, INC.

Dated: October 1, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34536

INDIANA & OHIO CENTRAL RAILROAD, INC.— ACQUISITION AND OPERATION
EXEMPTION—CSX TRANSPORTATION, INC.

RESPONSE OF INDIANA & OHIO CENTRAL RAILROAD, INC.

The Indiana & Ohio Central Railroad, Inc. (“IOCR”), a Class III carrier, responds in opposition to the Protest filed on September 13, 2004 by the Brotherhood of Locomotive Engineers and Trainmen (“BLET”), the Petition to Revoke Exemption filed on September 15, 2004 (the “Petition”) by the United Transportation Union (“UTU”), and the Amended Petition to Revoke Exemption filed on September 24, 2004 (the “Amended Petition”) by the UTU. IOCR respectfully requests that the Surface Transportation Board (the “Board”) deny all of the relief sought in the Protest, the Petition, and the Amended Petition.¹

BACKGROUND

IOCR submitted a bid to CSX Transportation, Inc. (“CSXT”) to acquire and operate about 107 miles of railroad.² The line consists of: (1) the Cincinnati Terminal Subdivision between NA Tower, OH, Milepost BB 7.5, and Oakley, OH, Milepost BB 12.4; and (2) the Midland Subdivision between Oakley, OH, Milepost BB 12.4, and Columbus, OH, Milepost BR

¹ This Response does not address any issues raised in the Protest, Petition, or Amended Petition that specifically relate to the Notice of Exemption filed in Finance Docket No. 34540, *Columbus & Ohio River Railroad Company -- Acquisition and Operation Exemption -- Rail Lines of CSX Transportation, Inc.* BLET and UTU argue that the sale to IOCR to the west of Columbus and the sale/lease to CUOH of the line on the east of Columbus are one transaction.

² IOCR will lease the right-of-way from CSXT.

114.6, all in the State of Ohio (the "Line"). CSXT selected IOCR as the winning bidder and negotiated the necessary agreements with IOCR.

IOCR and CSXT are not commonly controlled. IOCR is the subsidiary of RailAmerica, Inc. ("RailAmerica"). CSXT is the subsidiary of CSX Corporation (CSX"). The management of IOCR has a fiduciary duty to RailAmerica, the holding company of its sole stockholder, to negotiate an arms-length commercially reasonable agreement. RailAmerica, a publicly traded company, has a fiduciary responsibility to its shareholders to ensure that its subsidiaries negotiate arms-length commercially reasonable agreements. The management of CSXT has a fiduciary duty to its sole stockholder, CSX to negotiate an arms-length commercially reasonable agreement. CSX, a publicly traded corporation, has a fiduciary responsibility to its shareholders to ensure that its subsidiaries negotiate arms-length commercially reasonable agreements. For legitimate business reasons and to comply with their fiduciary obligations, IOCR and CSXT negotiated the necessary agreements at arms-length.

IOCR elected to seek exemption to acquire the Line from the provisions of 49 U.S.C. § 10902. IOCR posted, served and certified a labor notice on August 12, 2004 as required by the Board's rules at 49 C.F.R. § 1150.42(e) (the "Labor Notice"). See the Notice of Exemption filed on September 1, 2004, Exhibit C. The Labor Notice advised CSXT employees that IOCR projected at that time that it would hire four operating employees, one locomotive mechanic and two track inspectors, and that IOCR's collective bargaining agreement with BLET would apply to the operating employees.

Pursuant to 49 C.F.R. § 1150.43, IOCR filed a Notice of Exemption on September 1, 2004 (the "Notice") with the Board. The Notice proposed October 16, 2004 as the consummation date. The Notice also provided all of the information required by 49 C.F.R. §

1150.43 and was duly verified by an officer of IOCR.

The Protest, Petition, and Amended Petition request the exact same relief: (1) that the Notice be rejected; (2) that the proposed transaction be handled under 49 U.S.C. § 11325(d); and (3) that briefing and hearing be scheduled. Implicit in the relief sought by BLET and UTU is the revocation of the exemption.

PRELIMINARY MATTER

UTU filed the Petition on September 15, without any requested discovery as required by 49 C.F.R. § 1121.2. On September 24, UTU filed the Amended Petition and an informal request for discovery on IOCR. The Amended Petition is the exact same as the Petition, verbatim, except for being captioned “Amended” and the last four sentences that seek to justify discovery by saying “because of certain information it learned ... which it wants to investigate further.” However, UTU fails to specify the “certain information.”

The Board’s rules at 49 C.F.R. § 1121.2 require that a “party must file its discovery requests at the same time it files its petition to revoke.” There are no provisions in the Board’s rules permitting a party to seek discovery upon the filing of an Amended Petition to Revoke, as UTU has done here. In adopting section 1121.2, the Board stated “We ... will require that the petitioner make its discovery request at the same time it files its petition.” *Expedited Procedures for Processing Rail Rate*, 1 S.T.B. 754, 772 (1996) (“*Expedited Procedures*”). *Expedited Procedures* does not provide for the filing of an Amended Petition with discovery. Indeed, the Board was very clear that: “if petitioner does not file discovery requests when it files its petition to revoke, it will have waived its right to discovery.” *Id.*

Since UTU “waived its right to discovery,” IOCR will decline to provide discovery to UTU.

THERE IS NO REASON TO REJECT THE NOTICE

The Board's rules provide that it "may reject a document, submitted for filing, if the Board finds that the document does not comply with the rules." 49 C.F.R. § 1104.10(a). The Notice filed by IOCR complied with the Board's rules.

IOCR, a Class III railroad, proposes to acquire from CSXT and operate the Line. See 49 C.F.R. § 1150.41(a) and (b) and .42(a). IOCR provided the Labor Notice required by 49 C.F.R. § 1150.42(e). The Notice contains all of the information required by 49 C.F.R. § 1150.42(3) and the Caption Summary required by 49 C.F.R. § 1150.44. The Notice is verified as required by 49 C.F.R. § 1150.41(a). The original and 10 copies of the Notice were filed with the Board along with diskettes and the appropriate filing fee. Finally, the Notice was filed more than seven days before the effective date as required by 49 C.F.R. § 1150.42(b).

IOCR complied with all of the Board's rules in filing the Notice. BLET and UTU have not produced any argument or evidence that the Notice is not in compliance with the Board's rules. Therefore, IOCR respectfully requests the Board to deny the requests to reject the Notice.³

THIS IS A TRANSACTION UNDER 49 U.S.C. § 10902

BLET and UTU contend that CSXT is engaged in a program of rationalizing about 3,500 miles of railroad, and that it is improper for CSXT to dispose of this much track through small transactions in order to bypass Board review of the transactions under 49 U.S.C. §§ 11323 and 11324. BLET and UTU are wrong that the size of a transaction mandates the provisions of the ICC Termination Act (the "ICCTA") that apply to the transaction. As shown below, the ICCTA grants parties discretion as to whether to apply for authorization or exemption under either section 10902 or 11323.

A non-carrier may acquire and operate a line of railroad under 49 U.S.C. § 10901, regardless of length. *Wisconsin Central Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line Railroad Company*, ICC Finance Docket No. 31102 (ICC served October 8, 1987). The Interstate Commerce Commission (the “ICC”) determined that the acquisition of rail lines from Class I railroads was beneficial to the public and adopted an exemption process to expedite these transactions. *Class Exemption—Acq. & Oper. of R. Lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985). The ICC also looked into the issue of the sale of large railroad lines. *Class Exemption for the Acquisition and Operation of Rail Line under 49 U.S.C. §10901*, ICC Ex Parte No. 392 (Sub-No.1) (ICC served October 2, 1987, 52 Fed. Reg. 37350). As a result of notice and comment rulemaking, the ICC decided that the revenues generated by a rail line were more important in judging its competitive effect than the length of the line. *Class Exemption—Acq. & Oper. of R. Lines under 49 U.S.C. 10901*, 4 I.C.C.2d 309, 311 (1988). The ICC imposed additional procedures where the annual revenues projected in the transaction exceed Class I or II railroad revenue thresholds. See 49 C.F.R. § 1150.35. However, there is no limitation to the mileage involved in a transaction.

Under 49 U.S.C. § 10902, a Class II or Class III railroad may acquire or operate an additional rail line. As with acquisitions by new carriers under section 10901, the Board concluded that the growth of existing short line railroads fosters the rail transportation policy and the public interest. *Class Exem. for Acq. or Oper. under 49 U.S.C. 10902*, 1 S.T.B. 95 (1996). The Board also concluded that the determining factor in the size of a transaction was revenue, and the Board adopted a higher notice and disclosure standard. *Id.*, at 102.

Other than the statutory requirement prohibiting the use of section 10902 by Class I

³ IOCR notes that neither BLET nor UTU has argued that the Notice contains false or misleading

railroads, the Board did not address which transactions were required to be filed under section 10902 or section 11323. It is obvious that the Board did not address this issue is because the legislative history of section 10902 is clear. "By providing this clear delineation of requirements for Class II and Class III rail carriers acquiring rail lines, the Conference does not intend to limit the availability of section 10901 for non-carrier acquisitions. *In addition, Class II and Class III carriers retain the existing option ...to obtain approval of inter-carrier transactions under section 11323....* H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 180 (1995) (emphasis added).

Congress enacted legislation providing Class II and Class III rail carriers the option to prosecute acquisition transactions under either section 10902 or 11323. The only requirement for filing a proceeding under section 10902, or the exemption there from, is that the acquiring railroad be a Class II or Class III railroad. The following factors, urged by BLET and UTU are not to be considered: size of the transaction, size of the selling railroad, whether the selling railroad is engaged in an ongoing or long term plant rationalization program, the type of transaction (e.g. sale, lease, etc.), and whether the line is to be acquired as the result of a competitive bidding process or a single offer.

BLET and UTU argue that the proposed transaction must be reviewed by the Board under section 11323 because it is a transaction having regional or national transportation significance. However, BLET and UTU have only made this bald assertion. They have provided no facts or analysis in support. IOCR is acquiring a 107-mile line essentially between Cincinnati and Columbus, OH. CSXT and Norfolk Southern Railway Company will continue to serve Cincinnati and Columbus after the Line is acquired by IOCR. Moreover, a 107-mile rail line acquisition in southwestern Ohio does not have regional or national significance. IOCR would

information, which it does not.

be elated if there was so much local and overhead traffic volume on the Line as to raise regional and national concerns. But, there is not.

IOCR urges the Board to conclude that BLET and IOCR are wrong that approval or exemption of the proposed transaction must be sought under section 11323 instead of section 10902.

THERE IS NO BASIS TO REVOKE THE EXEMPTION

Implicit in the Protest, Petition, and Amended Petition is a request that the Board revoke the exemption sought by IOCR. The Board may revoke an exemption when it finds that application of a provision of the ICCTA is necessary to carry out the rail transportation policy (the "RTP") of 49 U.S.C. § 10101. The only provision of the RTP cited by BLET and UTU is section 10101(11), which provides that the Board should "encourage fair wages and safe and suitable working conditions in the railroad industry." Although BLET and UTU cite to section 11 of the RPT, neither addresses the specific factors. Unlike BLET and UTU, IOCR addressed section 10101(11) in the Labor Notice, and BLET and UTU have not even questioned that information. More importantly, as BLET has told its members, the collective bargaining agreement between BLET and IOCR meets the goals of section 10101(11).

BLET and UTU also misstate the criteria of section 10902 as an apparent basis for revocation. Although irrelevant here because IOCR is following the exemption process of 49 C.F.R. 1150.41, et seq., 49 U.S.C. § 10902 does not require an affirmative finding that a proposed transaction serves the public convenience and necessity, as contended by BLET and UTU. Indeed, section 10902(c) states that the Board "shall" authorize the transaction "unless the Board finds that such activities are inconsistent with the public convenience and necessity." As IOCR argues here, in an application proceeding, the burden of proof would be on BLET and

UTU to prove that the proposed acquisition is “inconsistent with the public convenience and necessity.” BLET and UTU have again made no arguments or provided any facts warranting such a conclusion.

BLET and UTU state that the proposed transaction is a “huge abandonment” by CSXT. As the Board well knows, abandonment is the termination of rail service, not the transfer of a rail line. A major purpose of the Board’s 10901 and 10902 exemptions was to prevent abandonments by reducing the regulatory burdens on the sale of railroad lines to short line operators. That is exactly what is happening here. Contrary to the view of BLET and UTU, CSXT does not appear to be pulling out of Ohio. IOCR notes that CSXT retains its main line between Chicago and the east through Ohio, as well as main north south and other lines.

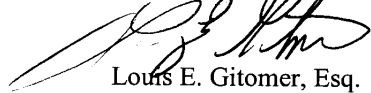
Finally, BLET and UTU allege that IOCR will use new abandonment rules to abandon the Line. First, as the Board well knows, the rules referred to by BLET and UTU have not even been proposed by the Board. Second, IOCR is not acquiring the Line to abandon it. IOCR, as a subsidiary of RailAmerica, is committed to complying with the RailAmerica Mission Statement, which in part states “RailAmerica [is] committed to delivering reliable, efficient and entrepreneurial rail services to customers.”

CONCLUSION

IOCR respectfully requests the Board to deny the relief requested by BLET and UTU and permit the Notice to become effective as proposed on October 16, 2004.

Gary A. Laakso, Esq.
Vice President Regulatory Counsel
INDIANA & OHIO CENTRAL
RAILROAD, INC.
5300 Broken Sound Blvd., NW.
Second Floor
Boca Raton, FL 33487
(561) 994-6015

Respectfully submitted,



Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street. NW., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for: INDIANA & OHIO
CENTRAL RAILROAD, INC.

Dated: October 1, 2004

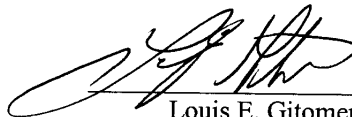
CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon the following parties by first class mail pre-paid.

Kevin C. Brodar
14600 Detroit Avenue
Cleveland, OH 44107-4250

Daniel R. Elliott, III
14600 Detroit Avenue
Cleveland, OH 44107-4250

Harold A. Ross
1370 Ontario Street, Suite 1548
Cleveland, OH 44113-1740



Louis E. Gitomer
October 1, 2004