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October 19, 2004

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001



Re: Finance Docket No. 34540, The Columbus & Ohio River
Rail Road Company – Acquisition and Operation Exemption
– Rail Lines of CSX Transportation, Inc. from Columbus to
Newark, Ohio and from Mt. Vernon to Cambridge, Ohio

Dear Secretary Williams:

Enclosed for filing in the referenced docket please find an original and ten
copies of the Reply of The Columbus & Ohio River Rail Road Company to Petition to
Revoke and Protest.

An additional copy of the Reply also is enclosed. Kindly indicate receipt of
the filing by time-stamping this extra copy and returning it to the bearer of this letter.
Thank you for your consideration in this matter.

Sincerely,

Andrew B. Kolesar III

Andrew B. Kolesar III
An Attorney for The Columbus & Ohio
River Rail Road Company

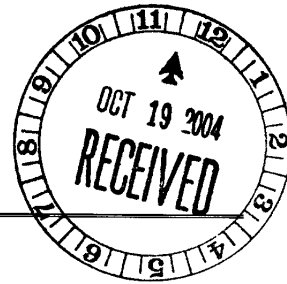
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Office of Proceedings

OCT 19 2004

Part of
Public Record

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD



THE COLUMBUS & OHIO RIVER RAIL)
ROAD COMPANY – ACQUISITION AND)
OPERATION EXEMPTION – RAIL LINES)
OF CSX TRANSPORTATION, INC. FROM)
COLUMBUS TO NEWARK, OHIO)
AND FROM MT. VERNON TO)
CAMBRIDGE, OHIO)

Finance Docket No. 34540

REPLY TO PETITION TO REVOKE AND PROTEST

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THE COLUMBUS & OHIO RIVER
RAIL ROAD COMPANY
47849 Papermill Road
Coshocton, Ohio 43812

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Dated: October 19, 2004

Attorneys & Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



THE COLUMBUS & OHIO RIVER RAIL)
ROAD COMPANY – ACQUISITION AND)
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OF CSX TRANSPORTATION, INC. FROM)
COLUMBUS TO NEWARK, OHIO)
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CAMBRIDGE, OHIO)

Finance Docket No. 34540

REPLY TO PETITION TO REVOKE AND PROTEST

On September 24, 2004, The Columbus & Ohio River Rail Road Company (“CUOH”), a Class III carrier, filed a Verified Notice of Exemption to permit CUOH to extend its existing lines through the acquisition by purchase and lease from CSX Transportation, Inc. (“CSXT”) of approximately 114 miles (collectively, the “subject Line” or the “Line”) of CSXT’s lines of railroad in Ohio. This Reply pertains to two documents that were: (i) filed in a different Finance Docket proceeding; (ii) filed prior to the date of CUOH’s Notice of Exemption; and (iii) were captioned only with respect to that different proceeding, but nevertheless made reference to CUOH’s anticipated Notice in their texts. Although neither document has been lodged properly in CUOH’s exemption proceeding, CUOH submits this Reply in Finance Docket No. 34540 out of an abundance of caution and requests that the Board deny the relief sought in each filing.

BACKGROUND

The other proceeding to which the subject documents relate involves a Notice of Exemption filed by the Indiana & Ohio Central Railroad, Inc. ("IOCR") on September 1, 2004 regarding the purchase and operation of approximately 107 miles of railroad owned by CSX Transportation, Inc. ("CSXT"). See Finance Docket No. 34536, Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption – CSX Transportation, Inc. (Notice filed September 1, 2004). Following the filing of this Notice by IOCR, both the Brotherhood of Locomotive Engineers & Trainmen ("BLET") and the United Transportation Union ("UTU") filed objections in Finance Docket No. 34536.

In particular, on September 13, 2004, BLET filed a Protest in Finance Docket No. 34536 and on September 15, 2004, UTU filed a Petition to Revoke the IOCR Exemption (nearly a verbatim copy of the BLET filing). UTU filed an Amended version of its Petition on September 24, 2004 (adding a request for discovery), and similarly filed its Amended Petition solely in Finance Docket No. 34536. The Protest and the Petition sought rejection of IOCR's Notice of Exemption, each contending that CSXT is engaged in an improper abandonment scheme and that the matter involves regional or national transportation significance. Notably, however, both the BLET Protest and the UTU Petitions also made internal reference to the CUOH Notice of Exemption that

subsequently would be filed in the instant docket, and both BLET and UTU requested that the Board reject CUOH's Notice, as well.¹

On October 1, 2004, IOCR filed its Response to the BLET and UTU filings in Finance Docket No. 34536. Therein, IOCR explained that BLET and UTU's various objections were entirely without merit and should be rejected by the Board. Finally, on October 5, 2004, UTU filed a letter in the CUOH docket (Finance Docket No. 34540) indicating that on September 30, 2004, it had mailed copies of its Petition to Revoke and its Amended Petition to Revoke to CUOH. UTU did not, however, file its Petition to Revoke or its Amended Petition in Finance Docket No. 34540. Moreover, to date, the BLET has not made any filing whatsoever in Finance Docket No. 34540.

ARGUMENT²

The BLET Protest and the UTU Petition (and Amended Petition) seek essentially the same relief. Namely, BLET and UTU request that the Board "reject" and/or "revoke" the Notice filed by CUOH, and request that the Board handle the proposed transactions under Chapter 113 of Title 49, including the scheduling of briefing and a hearing to investigate the matter. Finally, the UTU's Amended Petition indicates that UTU wishes to seek discovery.

¹ As indicated supra, CUOH filed its Notice of Exemption in Finance Docket No. 34540 on September 24, 2004.

² This Reply does not address any issues raised by BLET or UTU that specifically relate to the Notice of Exemption filed in Finance Docket No. 34536.

1. Rejection is Improper

Both BLET and UTU request that the Board “reject” CUOH’s Notice of Exemption. See BLET Protest at 2; UTU Amended Petition at 3. The Board’s regulations provide that the Board may “reject” a document if the Board finds that the document does not comply with the rules or if the notice contains false or misleading information. See 49 C.F.R. § 1104.10(a); Finance Docket No. 33960, Central Illinois R.R. – Lease and Operation Exemption – Lines of The Burlington Northern and Santa Fe Ry. at Chicago, Cook County, IL (STB served Sept. 12, 2002). Neither BLET nor UTU, however, has raised any allegation that CUOH’s Notice fails to comply with the Board’s procedural rules or that it contains false and misleading information. As such, the Board should deny BLET and UTU’s requests that the Notice be rejected.

2. Revocation is Improper

In addition to seeking rejection, the BLET and UTU filings at least implicitly seek revocation of CUOH’s exemption.³ Title 49 states that the Board may “revoke” a class exemption when it finds that application “in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.” See 49 U.S.C. § 10502(d). The

³ The UTU’s Amended Petition is identified as a “Petition to Revoke.” Moreover, a request for revocation appears to be implicit in the BLET Protest.

Board's regulations state that "[t]he person seeking revocation has the burden of showing that the revocation criteria of 49 U.S.C. 10502(d) have been met." See 49 C.F.R. § 1121.4(f).

In addition, the Board recently reaffirmed that in order "[t]o justify revocation, a petitioner must demonstrate reasonable, specific concerns addressing the revocation criteria." See Finance Docket No. 34503, Timber Rock Railroad, Inc. – Lease Exemption – The Burlington Northern and Santa Fe Ry. (STB served October 8, 2004) (denying UTU's petition to revoke). In considering whether revocation is appropriate, the Board must examine the provisions of the rail transportation policy that relate to the underlying statutory provision from which the exemption was obtained. See Finance Docket No. 34145, Bulkmatic Railroad Corp. – Acquisition and Operation Exemption – Bulkmatic Transport Co. (STB served May 15, 2003) (denying reconsideration of prior denial of the UTU-IL's petition to revoke). The statute from which exemption was noticed in this case (i.e., 49 U.S.C. § 10902) provides that the Board shall approve the subject transportation "unless the Board finds that such activities are inconsistent with the public convenience and necessity." Id. (emphasis added). In light of these standards, revocation in the instant proceeding is not warranted.

BLET and UTU argue principally that the proposed transaction must be reviewed by the Board under 49 U.S.C. § 11323 et seq. because it is a transaction having regional or national transportation significance. BLET and UTU fail to offer any

meaningful support for this assertion, contrary to 49 C.F.R. § 1121.3(c) (“A party seeking revocation of an exemption or a notice of exemption shall provide all of its supporting information at the time it files its petition.”). Instead, BLET and UTU’s filings merely include generalized allegations and misstatements of fact regarding the possible impact of the transactions on labor and the covert nature of the transactions as a “huge abandonment.”

With respect to the scope of the transactions, BLET and UTU argue without any support that CSXT is engaged in a covert effort to “rid itself of over 3,500 miles of track.” See BLET Protest at 1; UTU Amended Petition at 2. BLET and UTU fail to substantiate this argument or to explain its relevance to the CUOH notice in light of the §§ 10502(d) and 10902 standards. BLET and UTU also fail to support their contention that the CUOH transaction constitutes a “huge abandonment.” Id. As the Board well knows, abandonment is the termination of rail service, not the transfer of a rail line. It is the transfer of rail lines under 49 U.S.C. § 10902 that can prevent the types of abandonments feared by BLET and UTU.⁴

Moreover, BLET and UTU argue that the transaction is improper because CSXT “is merely leasing the right-of-way to IOC and to Columbus Ohio River.” Id. This

⁴ BLET refers to the Board’s proposed Class Exemption for abandonments in Ex Parte No. 647. See BLET Protest at 2. BLET fails to explain, however, why this proceeding has any relevance to the instant inquiry. In any event, CUOH can confirm that it is not engaging in the subject transaction as a rouse to permit expedited abandonment.

statement, even if true, would be of questionable relevance, but in any event, this statement is incorrect insofar as CUOH is purchasing CSXT's interest in the line from Columbus to Newark. See CUOH Notice at 4 ("Through the subject transaction, CUOH will purchase CSXT's 50% share in the Columbus to Newark line . . .").

The BLET and UTU objections are directed principally, of course, to concerns regarding labor, as is evident from the fact that the only aspect of the National Rail Transportation Policy identified in the two filings is subparagraph 11 of 49 U.S.C. § 10101 ("In regulating the railroad industry, it is the policy of the United States Government . . . (11) to encourage fair wages and safe and suitable working conditions in the railroad industry."). Significantly, however, both BLET and UTU fail to offer any explanation of the manner in which the CUOH exemption supposedly would or could hinder this policy. Instead, BLET and UTU merely state that it is "impossible to ascertain" if the transaction will carry out this rail transportation policy, and suggest that the Board must make an appropriate investigation to determine whether the policy is being carried out.⁵ Given the fact that the Board's regulations regarding revocation place

⁵ BLET and UTU also object that the transaction may not be an "arm's length" transaction. CUOH and CSXT are, of course, independent entities with no corporate ties whatsoever. CUOH has every interest in negotiating the most favorable deal possible for itself and in competing vigorously to provide the best service possible to its customers. CUOH thus can confirm that its transaction with CSXT is, in fact, an arm's length transaction.

the burden of proof upon the petitioning party, this allegation of theoretically possible harm is insufficient to warrant revocation of the exemption. See 49 C.F.R. § 1121.4(f).

In any event, CUOH reported previously that as a result of the transaction, “CUOH expects to hire approximately 6 operating employees (train & engine service) and approximately 3 other employees to perform maintenance of way and other functions. . . . Employees will be provided wages and benefits comparable to those on other CUOH lines.” See CUOH’s August 27, 2004 Notice to Employees, filed with the Board on August 30, 2004. As such, BLET and UTU’s effort to base their request for investigation on supposed uncertainty regarding employee interests is inappropriate and should be rejected.

3. Discovery is Improper

Finally, CUOH notes that in its Amended Petition, UTU raises the subject of discovery. See UTU Amended Petition at 3 (“UTU is also seeking discovery at the same time as it is filing this Amended Petition.”). UTU does not specifically indicate that it intends to seek discovery from CUOH in addition to IOCR. To date, CUOH has not received any discovery requests from UTU. In any event, since UTU failed to submit discovery requests in conjunction with its Petition, its request for discovery is improper. See 49 C.F.R. § 1121.2 (“In petitions to revoke an exemption, a party must indicate in the petition whether it is seeking discovery. If it is, the party must file its discovery requests at the same time it files its petition to revoke.”); Expedited Procedures for Processing Rail

Rate Reasonableness, Exemption and Revocation Proceedings, 1 S.T.B. 754, 772 (1996)

("[I]f petitioner does not file discovery requests when it files its petition to revoke, it will have waived its right to discovery. . .").

CONCLUSION

For the foregoing reasons, CUOH respectfully requests that the Board deny the relief sought by BLET and UTU.

Respectfully submitted,

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Certificate of Service

I hereby certify that this 19th day of October, 2004, I have caused a copy of the foregoing Reply to be served via first-class mail, postage prepaid, upon the following individuals:

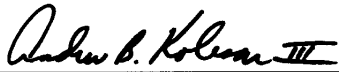
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