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October 28, 2004

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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 UTU's Third
Petition to Revoke.

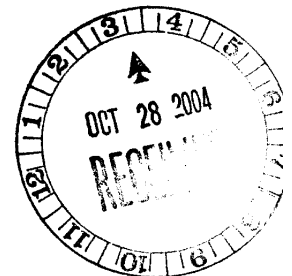
An additional copy of the Reply also is enclosed. Kindly indicate receipt of
the filing by time-stamping this extra copy and returning it to the bearer of this letter.
Thank you for your consideration in this matter.

Sincerely,



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

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 UTU’S THIRD PETITION TO REVOKE



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

OF COUNSEL:

SLOVER & LOFTUS
1224 17th Street, N.W.
Washington, D.C. 20036

Dated: October 28, 2004

By: Kelvin J. Dowd
Andrew B. Kolesar III
Slover & Loftus
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Attorneys & Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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THE COLUMBUS & OHIO RIVER RAIL	)	
ROAD COMPANY – ACQUISITION AND	)	
OPERATION EXEMPTION – RAIL LINES	)	
OF CSX TRANSPORTATION, INC. FROM	)	Finance Docket No. 34540
COLUMBUS TO NEWARK, OHIO	)	
AND FROM MT. VERNON TO	)	
CAMBRIDGE, OHIO	)	

REPLY TO UTU’S THIRD PETITION TO REVOKE

On October 22, 2004, the United Transportation Union (“UTU”) filed its Third Petition to Revoke (“Third Petition”) the exemption that was the subject of the Notice filed on September 24, 2004 in this proceeding by The Columbus & Ohio River Rail Road Company (“CUOH”). CUOH’s Notice invoked exemption authority to permit CUOH to acquire by purchase and lease approximately 120.35 miles of CSX Transportation, Inc.’s (“CSXT”) lines of railroad in Ohio (collectively, the “subject Line” or the “Line”).¹ CUOH respectfully submits that the UTU’s Third Petition is both procedurally and substantively defective and should be denied for the same reasons set forth in CUOH’s Reply to UTU’s two prior Petitions to Revoke.

¹ By filing dated October 22, 2004, CUOH notified the Board of certain minor changes in the details of the contemplated acquisition which had the effect of increasing the total mileage involved in the transaction from 114 miles to 120.35 miles. See Supplemental Information Regarding Notice of Exemption filed by The Columbus & Ohio River Rail Road Company, filed October 22, 2004.

BACKGROUND

UTU filed its first Petition to Revoke regarding the CUOH transaction on September 15, 2004 in Finance Docket No. 34536, Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption – CSX Transportation, Inc. (Notice filed September 1, 2004) (“First Petition”). Although UTU filed this First Petition only in Finance Docket No. 34536, UTU nevertheless requested therein that the Board revoke CUOH’s exemption in the instant docket. On September 24, 2004, UTU filed an Amended Petition to Revoke in Finance Docket No. 34536 (“Amended Petition”), adding a request for discovery from the Indiana & Ohio Central Railroad (“IOCR”) to its prior Petition. Once again, UTU’s Amended Petition sought revocation of the exemptions in both Finance Docket No. 34536 and the instant docket.

On October 5, 2004, UTU filed a letter with the Board in the instant proceeding (i.e., Finance Docket No. 34540) indicating that on September 30, 2004, UTU had mailed copies of its First Petition to Revoke and its Amended Petition to Revoke to CUOH. Notwithstanding the procedural irregularities associated with the UTU filings, out of an abundance of caution, CUOH filed a reply to UTU’s First Petition and its

Amended Petition on October 19, 2004.² The UTU's Amended Petition remains pending before the Board.

Without any mention of the fact that it already had filed both a Petition and an Amended Petition to revoke the CUOH exemption, UTU filed its Third Petition to Revoke on October 22, 2004. Notably, this Third UTU Petition was the first to be filed in Finance Docket No. 34540. UTU served a request for discovery upon CUOH in conjunction with the Third Petition. See Exhibit A hereto.

UTU's Third Petition includes only the following brief argument in support of revocation:

The exemption claimed by the Notice of Exemption should be revoked for the following reasons, among others:

1. The transactions, in whole or in part, noticed for exemption do not fall within the noncarrier line acquisition class exemption promulgated by 49 C.F.R. § 1150.41, *et seq.*
2. Regulation of the transactions, in whole or in part, is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101.
3. The Notice contains false or misleading information about the transaction.

See Third Petition at 3.

² CUOH's Reply also addressed arguments raised by the Brotherhood of Locomotive Engineers and Trainmen ("BLET") in a September 13, 2004 Protest that BLET filed in Finance Docket No. 34536. Like the UTU's Petition and Amended Petition, the BLET filing also sought revocation of the CUOH exemption.

ARGUMENT

1. Legal Standards

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 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 Oct. 8, 2004) (“Timber Rock Railroad”) (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).

Finally, the Board’s regulations provide that a party seeking revocation of a notice of exemption shall provide “all of its supporting information at the time it files its petition.” See 49 C.F.R. § 1121.3(c).

2. UTU’s Third Petition is Both Procedurally and Substantively Defective

UTU’s approach to seeking revocation of the CUOH exemption is highly irregular. CUOH is unaware of any precedent supporting the filing of multiple Petitions to Revoke (in different dockets) regarding the same Notice of Exemption. In any event, UTU’s Third Petition is substantively deficient and the relief requested therein should be denied.

UTU first contends in its Third Petition that “[t]he transactions, in whole or in part, noticed for exemption do not fall within the noncarrier line acquisition class exemption promulgated by 49 C.F.R. § 1150.41, *et seq.*” See Third Petition at 3. This argument is nonsensical. Section 1150.41 of the Board’s regulations does not pertain to “noncarrier” line acquisitions, and CUOH has never argued that it is a noncarrier. On the contrary, CUOH explained in its Verified Notice that it is, in fact, a Class III carrier which operates in Ohio. See CUOH Notice at 1. CUOH has invoked the exemption applicable to line acquisitions by Class III carriers. See 49 C.F.R. Part 1150, Subpart E (“Exempt Transactions Under 49 U.S.C. 10902 for Class III Rail Carriers”).

The only other “arguments” raised by UTU include the assertions – without any accompanying explanation – that “[r]egulation of the transactions, in whole or in part, is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101” and that “[t]he Notice contains false or misleading information about the transaction.” See Third Petition at 3. These wholly unsupported and vague claims fall far short of the required standard of proof set forth in the Board’s regulations. In fact, without some hint of the rail transportation policy supposedly implicated by the Notice or some identification of the allegedly “false or misleading information” included within the Notice, these statements do nothing more than recite the Board’s revocation standards. Those simple recitals do not constitute the demonstration of “reasonable, specific concerns addressing the revocation criteria.” See Finance Docket No. 34503, Timber Rock Railroad, supra. As such, the Board should deny UTU’s request for revocation.

3. UTU’s Request for Discovery is Improper

Finally, as indicated, supra, UTU served a set of discovery requests upon CUOH in conjunction with its Third Petition, but had not previously served any discovery upon CUOH. Since UTU failed to submit discovery requests in conjunction with its First Petition, however, UTU has waived its right to discovery and its requests are 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. . . .") (emphasis added). Here, by waiting until the submission of its Third Petition to Revoke before serving discovery requests upon CUOH, UTU has "waived its right to discovery." Id.

CONCLUSION

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

Respectfully submitted,

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

OF COUNSEL:

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1224 17th Street, N.W.
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By: Kelvin J. Dowd
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(202) 347-7170

Dated: October 28, 2004

Attorneys & Practitioners

Certificate of Service

I hereby certify that this 28th 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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Exhibit A

October 21, 2004

Andrew B. Koesar, III
Slover & Loftus
1224 17th Street, N.W.
Washington, DC 20036

Re: Finance Docket No. 34540

Dear Mr. Kolesar:

This is to request production of various materials set forth in the Notice of Exemption in this proceeding, filed September 24, 2004, as follows:

1. All leases and other written arrangements between the Columbus & Ohio River Rail Road Company (CUOH), CSXT and/or the Ohio Department of Transportation including leases and other arrangements that bear upon the CUOH leases and operations at issue in the above-referenced Finance Docket. *See*: Notice of Exemption, at pp. 3-4.
2. Any written arrangements between CSXT, the State of Ohio, Ohio Southern Railroad, Inc, Ohio Central Railroad, and/or CUOH regarding ownership or other interests in the subject line prior to the effective date of the transaction at issue. *See* Notice of Exemption at pp. 3-4.
3. Any operating agreement between CUOH, CSXT and/or State of Ohio regarding the C&N subdivision.

This request is made pursuant to 49 C.F.R. § 1121 in accordance with the petition to revoke, along with 49 C.F.R. § 1114.

Sincerely,

A handwritten signature in black ink, appearing to read "D. R. Elliott, III", is written over a horizontal line.

Daniel R. Elliott, III
Associate General Counsel