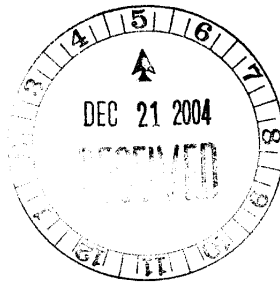


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December 21, 2004

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

ENTERED
Office of Proceedings

DEC 21 2004

Part of
Public Record

RE: STB Ex Parte No. 346 (Sub-No. 25)
General Exemption Authority-- Lumber Or Wood Products

Dear Secretary Williams:

North Coast Railroad Authority ("NCRA"), hereby submits an original and eleven copies of the Reply Of North Coast Railroad Authority To The Petition For Partial Revocation Of Exemption. As can be seen from the Certificate of Service, a copy of said filing has been served by courier on Petitioner's counsel.

Please acknowledge the receipt and docketing of the enclosed filing by receipt stamping the eleventh copy thereof enclosed for that purpose and returning same to the person making this filing, for return to me. If there are any questions concerning this filing, please contact me.

Sincerely,

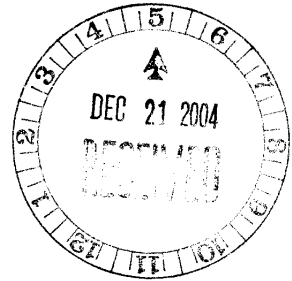
William A. Mullins

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 346 (Sub-No. 25)

**GENERAL EXEMPTION AUTHORITY
-- LUMBER OR WOOD PRODUCTS**



**REPLY OF NORTH COAST RAILROAD AUTHORITY TO
THE PETITION FOR PARTIAL REVOCATION
OF EXEMPTION**

**ENTERED
Office of Proceedings**

DEC 21 2004

**Part of
Public Record**

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**Attorneys for
North Coast Railroad Authority**

December 21, 2004

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 346 (Sub-No. 25)

**GENERAL EXEMPTION AUTHORITY
-- LUMBER OR WOOD PRODUCTS**

**REPLY OF NORTH COAST RAILROAD AUTHORITY TO
PETITION FOR PARTIAL REVOCATION
OF EXEMPTION**

On May 22, 2003, the Surface Transportation Board ("STB" or "Board") received a pleading entitled a "Petition for Partial Revocation of Exemption ["Petition"] of Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. ["Petitioner"]." The Petition requests the STB to revoke a well-established exemption from regulation for the transportation of lumber and wood products for the sole purpose of entertaining Petitioner's related Complaint, which was filed on that same date in STB Finance Docket No. 34337, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad. North Coast Railroad Authority was given a copy of the Petition and the Complaint in May of 2003.

Neither the Complaint nor the Petition was formally docketed on the date they were filed with the Board, nor did the Board begin a proceeding at that time to consider either the Petition or the Complaint, apparently because Petitioner did not file the requisite filing fees. It was not until Petitioner had established that a waiver of the filing fees was justified that the Complaint and the Petition were formally entered into the docket. This did not occur until December 1, 2004.

Upon formal docketing, North Coast Railroad Authority ("NCRA") was not served with either the Complaint or the Petition and was not notified by Petitioner that the Board had docketed the proceedings. Because of the failure of service of process, as required by 49 C.F.R. §§ 1111.3 and 1104.12, it is unclear whether NCRA is required to reply to the Petition during the normal 20-day period established by 49 C.F.R. § 1104.13 or §1111.4(b). Nonetheless, NCRA hereby replies to the Petition and is concurrently filing under separate cover its Answer to the Complaint.¹

NCRA submits that Petitioner has not demonstrated (nor could Petitioner demonstrate) that it is necessary under the rail transportation policy for the STB to partially revoke the well-established exemption for lumber and wood products, 49 C.F.R. §1039.11, in order for the STB to assert jurisdiction over the Complaint. Revocation of the exemption is only appropriate where necessary to prevent an abuse of market power against shippers and is entirely inappropriate here where the Complaint is from a connecting carrier, not a shipper. Petitioner has not made even a rudimentary showing that under the facts of this case revocation is necessary to prevent NCRA from exercising market power over shippers or to further the goals of the rail transportation policy. Furthermore, as more fully set forth in the Answer, NCRA is not even the operator of the line. The operator of the line is the Northwestern Pacific Railway Co., LLC ("NWPY") under

¹ NCRA notes that the Board should reject the Petition and related Complaint for several important procedural and substantive reasons, including failure to name the correct party; immunity under the Eleventh Amendment; and superceding safety orders from the Federal Railroad Administration. See NCRA's Answer to the Complaint, submitted contemporaneously with this Reply in STB Finance Docket No. 34337, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad, filed December 21, 2004.

contract with NCRA pursuant to a lease approved by the Board in 2001.² NCRA submits that the actions taken by NWPY were entirely reasonable under the circumstances and do not constitute justification for partial revocation of the exemption. For these reasons and others, the Petition to revoke should be denied and the Board should not begin a proceeding to revoke the exemption.

ARGUMENT

In the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 31 (1976), and the Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress directed the Interstate Commerce Commission (“ICC”) to reduce its supervision of the railroad industry so that carrier rates and practices would be disciplined by market forces rather than government regulation. With these statutes, Congress gave the ICC authority to exempt categories of rail traffic from regulation where:

(1) [it] is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10505(a) (1988). Pursuant to that directive, the ICC exempted the movement of lumber by rail from regulation in July 1991. In doing so, it found that regulation of lumber movements by rail was not necessary to carry out the rail transportation policy or to protect shippers from the abuse of market power. Rail General Exemption Authority – Lumber or Wood Products, Ex Parte No. 346 (Sub-No. 25), 7 I.C.C.2d 673 (July 1, 1991) (“Lumber Exemption”).

² STB Finance Docket No. 33998, Northwestern Pacific Railway Co., LLC—Lease and Operation Exemption—North Coast Railroad Authority, Northwestern Pacific Railroad Authority and Golden Gate Bridge, Highway and Transportation District, served February 6, 2001.

Lumber was the major commodity transported over the line at issue in this proceeding. Petitioner seeks to have the Board partially revoke the lumber exemption in order for the Board to hear a complaint, not filed by Georgia Pacific Corporation (“GP”),³ who was a major shipper of lumber over the line,⁴ but by the Trustee in Bankruptcy for the California Western Railroad, Inc. (“CWR”), a connecting carrier.⁵ Petitioner alleges NCRA has “ceased rendering service...discontinued operations...failed to provide facilities.... [and] prevented the continuous carriage of freight shipments” (Petition, Para. 4). NCRA has answered the Complaint and is prepared to fully address the merits of those issues if the Board begins a Complaint proceeding. NCRA is also fully prepared to address the merits of those issues if the Board begins a proceeding to partially revoke the exemption, but NCRA submits that the Board should not begin a proceeding to partially revoke the lumber exemption in order to hear Petitioner’s Complaint.

Although the STB retains the power to revoke an exemption, 49 U.S.C. §10502(d) (2000), the power depends on finding that revocation is necessary to support the rail transportation policy (“RTP”). See generally Rail General Exemption Authority – Miscellaneous

³ GP began in 1997 to shut down its operations at the mill formerly served by California Western Railroad, Inc., following GP’s sale of its timber holdings in Mendocino County, CA, which supplied raw materials to the mill.

⁴ It is worth noting that Congress focused on shippers as the protected class when it passed the exemptions from regulation, not on connecting carriers. (Regulation is “needed to protect shippers from the abuse of market power.” 49 U.S.C. § 10505(a) (1988).) This assumption is commonly used in STB (and federal court) decisions that discuss petitions for revocation of a commodities exemption. See e.g., G. & T. Terminal Packaging Co., Inc. v. Consolidated Rail Corp., 830 F.2d 1230 (3rd Cir. 1987).

⁵ It is also unclear whether the Trustee in Bankruptcy even has standing to file the Complaint and the Petition because, to the best of NCRA’s belief, the Trustee has assigned its “interest” in this litigation to the company that has purchased the California Western track from the bankruptcy court. That company is currently operating an excursion train over a portion of the CWR track. If NCRA’s belief is correct, then that company may have standing to pursue the issue, not the Trustee.

Agricultural Commodities – Petition of G. & T. Terminal Packaging Co., Inc., et al. To Revoke Conrail Exemption, Ex Parte No. 346 (Sub-No. 14A), 8 I.C.C.2d 674, 1992 LEXIS 154 (July 16, 1992) (“Agricultural Commodities”). Section 10502(d) requires the party petitioning to revoke the exemption to demonstrate conduct to a degree that frustrates the national transportation policy. It also must show that STB reregulation can and will be effective in carrying out the Policy. Agricultural Commodities, at *5-*6. See also, Mr. Sprout, Inc. v. Interstate Commerce Commission, 8 F.3d 118, 122 (2nd Cir. 1993) (noting that the standard for revocation is based in transportation policy considerations) (“Mr. Sprout”); Lumber Exemption, at *11-*12 (noting that the STB retains jurisdiction in cases where a railroad is found to be abusing market power). Indeed, a petition for revocation must be supported by clear facts that support a reversal of STB policy – not merely an allegation that one or more of the fifteen policy considerations “might” be affected.⁶ In sum, the Petition must show (i) an abuse of market power, (ii) that regulation of the commodity is necessary to prevent that abuse (*i.e.*, that there is a nexus – how regulation would (or could) repair the plaintiff’s injury), and (iii) that regulation furthers the overall goals of rail transportation policy.

⁶ The ICC emphasized this point with great detail:

If the activities that constitute the basis of a petition to revoke are beyond the [STB’s] regulatory reach, revocation would serve little or no purpose. Moreover, violations must be serious enough to indicate abuse of market power which can and ought to be corrected by regulation. ***Thus, a finding of what might be a minor violation (if regulation were in effect), or a slightly adverse impact on one component of the NRTP, does not necessarily indicate that reregulation is appropriate.*** Such a finding would have to be balanced against all of the other relevant NRTP factors, to determine whether revocation and reregulation are necessary.

Mr. Sprout I, at *6-*7 (emphasis added).

Because the Petitioner has not (and NCRA⁷ submits could not have) demonstrated the three elements for revocation, the Petition must be denied. First, Petitioner has not offered any evidence of competitive abuse (or abuse of market power) by NCRA (or NWPY) in the shipping of lumber or wood products in the relevant transportation market. As noted in Agricultural Commodities, Lumber Exemption, and Mr. Sprout, a finding of abuse of market power is necessary to revoke a commodity exemption. Agricultural Commodities, 1992 ICC LEXIS at *1; Lumber Exemption, 1991 ICC LEXIS at *11; Mr. Sprout, 124-26. Here, Petitioner is obligated to demonstrate that NWPY had market dominance over the transportation of lumber in order to justify revocation. As noted by the Lumber Exemption decision, however, so long as an alternative form of transportation exists, the STB cannot find an abuse of market power. Lumber Exemption, at *10 (“there is adequate intermodal, intramodal, geographic and product competition for the lumber traffic”). Therefore, because Petitioner does not put forth any evidence that trucking (or any other form of transport) was unavailable when the NWPY shut down operations, then the Petition cannot meet the first hurdle for revocation.⁸

Next, Petitioner has not offered any evidence of a nexus between Petitioner’s alleged problems and the need to regulate the NWPY operations. There must be a connection between the requested relief and the need for regulation – the regulation must be “necessary” - or a petition to revoke will be denied. Agricultural Commodities, at *17. While the Petitioner complains it had not received service (Petition, Para. 5), it also admits on the same page that

⁷ NCRA again notes its objection to Petitioner’s assertion that NCRA is the carrier responsible for service to Petitioner, as stated in NCRA’s Answer to Petitioner’s Complaint. See Note 1, *supra*.

⁸ Moreover, NCRA believes that for a period of time, California Western Railroad was unable to operate on its own line, interrupting its ability to serve GP.

service was stopped due to a Emergency Service Order from the Federal Railroad Administration (“FRA”), which “effectively shut down” service. Petition, Para. 2. A plain reading of the Petition shows that the shut down order was completely unrelated to the need for the STB to regulate the movements (*e.g.*, lumber or wood products) that traveled over the line. The shut down was necessary to prevent allegedly unsafe operating conditions. Petitioner simply fails to tender any evidence of how application of the RTP to the facts at hand would have enhanced the goals of the RTP.

On the other hand, NCRA submits that denying the Petition is the action most consistent with the goals of the RTP. First, 49 U.S.C. § 10101 clearly supports safety as one of the primary goals of regulation of the rail industry. 49 U.S.C. § 10101(3), (8), & (11). The STB itself recognizes that safety is an important issue and that Congress intended the FRA to possess the authority to regulate safety issues for rail transportation. Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, and Acquisitions of Control; and Procedures for Surface Transportation Board Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers and Acquisitions of Control, STB Ex Parte No. 574, at pp. 10-11 (STB served March 8, 2002). Petitioner would have this agency partially revoke its lumber exemption in order to assess damages against a railroad because that railroad was following FRA safety orders. How such an order would be consistent with the RTP’s policy of promoting safety goes unexplained.

Second, NCRA submits that denying the Petition is also consistent with the RTP’s goal and the STB’s commitment to less regulation and freer, open competition, especially when the type of commodity transported over the line was subject to pervasive intermodal competition. See Section 10101(1), (2), & (5); and Lumber Exemption at *4-*5.

Finally, NCRA submits that the Petitioner could have sought more appropriate relief in the form of a request for directed service, under 49 U.S.C. § 11123 and 49 C.F.R. Part 1146, which would have properly addressed the allegations in Petitioner's Complaint. Petitioner did not seek such relief, however. Now, four years later, and in an attempt to squeeze money out of NCRA – a state-created agency tasked with trying to save the involved line from disintegration that has resulted from various natural disasters and years of neglect under management of major railroads - as part of CWR's bankruptcy proceeding, Petitioner has filed its Complaint and its Petition. The Petition does not establish that Petitioner is entitled to the requested relief.

PRAYER FOR RELIEF

WHEREFORE, NCRA submits that Petitioner has not demonstrated (nor could Petitioner demonstrate) that STB repeal of the well-established exemption for lumber and wood products, 49 C.F.R. § 1039.11, is necessary to serve the national rail transportation policy, as required by 49 U.S.C. § 10502(d), and as set out above. Therefore, NCRA requests that the STB deny the Petition for Partial Revocation of Exemption with prejudice, and provide NCRA with such other and further relief as the STB deems proper.

Respectfully submitted,

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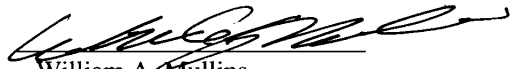

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Attorneys for North Coast Railroad Authority

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2004, I have caused the foregoing Reply Of North Coast Railroad Authority To The Petition For Partial Revocation Of Exemption to be served by hand delivery on:

Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036-1601

A handwritten signature in black ink, appearing to read 'William A. Mullins', is written over a horizontal line.

William A. Mullins
Attorney for North Coast Railroad Authority