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UPS Next Day Air

August 24, 2005

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001
(202) 656-1674

ENTERED
Office of Proceedings

AUG 24 2005

Part of
Public Record

Re: Finance Docket No. 34540



Dear Secretary Williams:

Pursuant to my conversation with a member of your staff, please find enclosed an original and ten (10) copies of a Redacted Version of United Transportation Union's Supplemental Petition to Revoke in the above-captioned matter. In accordance with prior Board orders, we have also enclosed a disk in WordPerfect format.

Thank you for your cooperation.

Sincerely,

Daniel R. Elliott, III
Associate General Counsel

Enclosures

cc: C. J. Miller, III, General Counsel

24589

REDACTED PUBLIC VERSION
BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34540

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

**UNITED TRANSPORTATION UNION'S
SUPPLEMENTAL PETITION TO REVOKE**

ENTERED
Office of Proceedings

AUG 25 2005

Part of
Public Record

Daniel R. Elliott, III
Associate General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107
Tel: (216) 228-9400
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United Transportation Union (“UTU”) respectfully submits its supplemental petition to revoke filed under seal in this proceeding. After engaging in discovery, UTU asserts that the notice of exemption contains false and misleading information, and regulation of this transaction is necessary to carry out the rail transportation policy.

PROCEDURAL HISTORY

On September 24, 2004, the Columbus & Ohio River Railroad Company (“CUOH”), a Class III rail carrier, filed a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire and operate, pursuant to an agreement with CSX Transportation, Inc. (“CSXT”), approximately 114 miles of rail line: (1) by purchase, between Columbus, OH milepost BP 138.0, and Newark, OH, milepost BQ 0.0, totaling approximately, 32.6 miles; and (2) by lease, between Mt. Vernon, OH, milepost BQ 25.9, and Cambridge, OH, milepost BP 49.49, via Newark, milepost BQ 0.0, totaling approximately 81.4 miles. The lines are located in Franklin, Licking, Muskingum, Knox, and Guernsey Counties, OH. The transaction also included approximately 1.5 miles of incidental trackage rights assigned by CSXT to CUOH over a line of the Ohio Southern Railroad, Inc. (“OSR”) between milepost 16.7 and milepost 19.2 in Zanesville, OH. Notice of the exemption was published in the Federal Register (69 FR 6170) on October 20, 2004, and was served on October 21, 2004.

On October 22, 2004, CUOH submitted a supplemental notice to increase the amount of rail lines it proposed to acquire from approximately 114 miles to approximately 120.35 miles, as follows: (1) by purchase, between Columbus, OH, milepost BP 137.0, and Newark, OH, milepost BP 100.6, and between milepost BBW 0.0 and milepost BBW 1.8 in Newark, totaling approximately 38.2 miles; and (2) by lease, between Cambridge, OH, milepost BP 49.49 and Newark milepost BP 100.6, between Cambridge milepost BPB 0.0 and Byesville, OH, milepost 5.14, and between Newark milepost BQ 0.0 and Mt. Vernon, OH, milepost BQ 25.9, totaling approximately 82.15 miles. To give

notice of CUOH's supplemental filing to include the additional 6.35 miles of rail line, a second notice of exemption in this proceeding was served and published in the Federal Register (60 FR 76029) on December 20, 2004.

On September 13, 2004, the Brotherhood of Locomotive Engineers & Trainmen ("BLET") filed a protest asking the Board to reject CUOH's notice and a notice filed in *Indiana & Ohio Central Railroad, Inc., – Acquisition and Operation Exemption – CSX Transportation, Inc.*, STB Finance Docket No. 34536 (STB served Oct. 1, 2004), for another shortline carrier to operate through lease approximately 107 miles of CSXT's rail line between NA Tower, OH, and Oakley, OH, and Oakley and Columbus, OH. On September 15, 2004, the United Transportation Union ("UTU") filed a pleading titled as a petition to revoke, seeking relief identical to that sought by BLET. In their filings, BLET and UTU sought the same relief regarding CUOH's notice filed here.

On September 24, 2004, an amended petition to revoke was filed by UTU. By facsimile filed on September 30, 2004, UTU certified to the Board that it served a copy of its pleadings upon CUOH, and UTU filed another petition to revoke on October 22, 2004, and sought discovery. On October 19 and 28, 2004, CUOH filed replies. On November 16, 2004, UTU filed a motion to compel. CUOH responded on December 6, 2004.

Following the service and publication of CUOH's second notice of exemption, UTU filed a supplemental petition to revoke on January 25, 2005, and filed a renewed motion to compel discovery on January 27, 2005. CUOH replied in opposition to each of these filings on February 7, 2005.

By decision served on February 22, 2005, UTU's motion to compel was granted. The decision also set a procedural schedule that provided the following: (1) discovery must be completed by March 4, 2005; and (2) UTU's supplement to its petition to revoke is due by March 21, 2005; and (3) CUOH's reply is due by April 5, 2005.

On March 9, 2005, the Board also granted CUOH's request for a protective order.

SUPPLEMENTAL FACTS

REDACTED

Prior to these transactions, CSXT employees, some of whom are represented by UTU, provided service on the C&N Subdivision and a line of railroad of the Lake Erie and Central Ohio Subdivisions without the use of a third party carrier like CUOH. This work was all done subject to a UTU/CSXT collective-bargaining agreement. This work will now all be done by CUOH.

ARGUMENT

Under 49 U.S.C. § 10505(d), the Board may revoke an exemption if it is found that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a. Labor interests may raise issues concerning the appropriate level of labor protection in a petition for revocation. *See* 49 U.S.C. § 10505(g)(2) and *Simmons v. ICC*, 900 F.2d 1023 (7th Cir. 1990). In addition, to the extent a party wishes to challenge the bona fides of a transaction, the Board retains the right to review the transaction to protect the integrity of its processes. *Minnesota Comm. Ry., Inc. – Trackage Exempt. – BNRR. Co.*, 8 I.C.C.2d 31 (1991). The party seeking to revoke an exemption must meet its burden of proof by articulating reasonable, specific concerns to satisfy the revocation criteria. *Wisconsin Central Ltd., – Exemption Acquisition and Operation – Certain Lines of Soo Line Railroad Company*, Finance Docket No. 31102 (ICC served July 28, 1988), and *Minnesota, supra*, at p. 35. *Accord, Norfolk Southern Railway Company--Trackage Rights Exemption– Norfolk and Western Railway Company*, Finance Docket No. 322661 (STB served Feb. 21, 1996).

This case involves several unusual features which can only lead one to conclude the transaction is a device created merely to move a number of jobs out from under a collective-

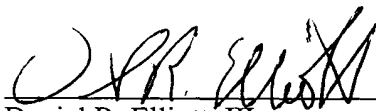
bargaining agreement (CSXT) onto a nonunion carrier (CUOH). The circumstances surrounding the transaction indicate that the transaction was not motivated by a desire of the parties to realize legitimate business goals. The CUOH was not a logical entity to be considered as the operator. CUOH was clearly used by CSXT to evade its collective-bargaining agreement responsibilities, one of many facts that make it like the transaction in *Sagamore National Corporation--Acquisition and Operation Exemption--Lines of Indiana Hi-Rail Corporation*, Finance Docket No. 32523, *et al.* (ICC served Oct. 28, 1994).

REDACTED

CONCLUSION

Hence, the notice of exemption should be revoked.

Respectfully submitted,

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

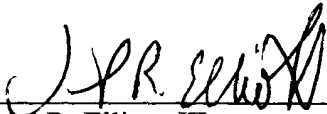
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing United Transportation Union's has been served this 23rd day of August, 2005, via first-class, postage pre-paid mail upon the following:

Andrew B. Kolesar, III
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Daniel R. Elliott, III