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SERVICE DATE – OCTOBER 8, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35042

U S RAIL CORPORATION—LEASE AND OPERATION EXEMPTION—SHANNON G., A  
NEW JERSEY LIMITED LIABILITY COMPANY

Decided: October 7, 2008

On June 6, 2007, U S Rail Corporation (U S Rail) filed a verified notice of exemption to lease and operate approximately 1,400 feet of track then under construction. The Board delayed the effectiveness of the exemption pending additional evidence and further order of the Board. The City of Paterson, NJ (City), and the New Jersey Department of Environmental Protection (NJDEP) submitted filings in opposition to the notice of exemption. As discussed below, we are rejecting U S Rail's notice of exemption.

BACKGROUND

On June 6, 2007, U S Rail, a Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to lease from Shannon G. (SG), a New Jersey limited liability company and noncarrier, approximately 1,400 feet of track that U S Rail stated SG was then constructing in Paterson, NJ, and to operate over it. As a result of this transaction, U S Rail stated that it would provide exclusive common carrier rail freight service over the trackage serving a transload terminal owned by SG.<sup>1</sup>

In a decision served June 15, 2007, the Board held that it would not allow U S Rail's exemption to become effective until further notice and that the applicant should provide additional information. Noting that the track which SG was constructing might be a line of railroad that requires prior Board approval, the Board directed U S Rail to file supplemental information to explain its claim that the track was not subject to the Board's jurisdiction because it was so called "private" track. U S Rail timely filed its supplement on July 3, 2007.

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<sup>1</sup> U S Rail claims that it would interchange traffic with The New York, Susquehanna and Western Railway Company (NYS&W). On June 11, 2007, NYS&W submitted a filing in which it explains that it has not entered into an interchange or switching agreement with U S Rail, and that it currently has no rail connection with SG's facility. NYS&W further stated that, should the exemption become effective, it would be prepared to negotiate arrangements to provide service to the facility.

The City, in its opposition, explained that, on April 25, 2007, it began eminent domain proceedings on the property upon which the track in question was located. In its reply in opposition, NJDEP explained that it believes that U S Rail is using the notice of exemption process to shield the carrier's handling of waste from state and local environmental laws. U S Rail filed a rebuttal to the City's submission on August 17, 2007, and a reply to NJDEP's submission on August 30, 2007.

#### POSITIONS OF THE PARTIES

The City argues that we should reject the notice as being void ab initio because U S Rail omitted information or presented a number of facts and issues inaccurately. The City claims that U S Rail failed to tell the Board in its notice of exemption that the City had already initiated a condemnation action involving the property at issue here. The City also claims that U S Rail was not truthful when it stated that it did not intend to handle waste.

Additionally, the City argues that the carrier's proposed operations appear to meet or exceed our thresholds for an environmental review and that U S Rail's claims to the contrary are false and misleading.

The City argues that the transaction is not suited for the notice of exemption process, as the project is controversial. The City also points out that the transaction does not involve the continuation of rail service on the line, because U S Rail is actually seeking to lease and operate newly constructed track on SG's property.

The City further asserts that the Board should reject the notice of exemption based on another Board proceeding, Jefferson Terminal Railroad Company—Acquisition and Operation Exemption—Crown Enterprises, Inc., STB Finance Docket No. 33950 (STB served Mar. 19, 2001) (Jefferson Terminal). The City explains that the Board revoked the exemption in that case for a number of reasons that also apply here, including that the applicant there also failed to be candid about a pending condemnation proceeding.

NJDEP echoes many of the arguments raised by the City. NJDEP asserts that U S Rail is attempting to use the Board's processes as a means of shielding waste activities at the site from state and local environmental laws and that U S Rail has not demonstrated that environmental review is unnecessary in this proceeding. NJDEP argues further that the Board should reject the notice because U S Rail has not sufficiently explained why the track that SG was constructing is private track and thus beyond the Board's jurisdiction.

In its replies to the arguments presented by the City and NJDEP, U S Rail asserts that it no longer handles solid waste at any of its other locations and that it does not seek to handle waste, including construction and demolition debris, at the SG transloading site. U S Rail claims that its plans with SG to bring rail service to the site significantly predated the City's condemnation action and that U S Rail, a bona fide rail carrier, had no intent to deceive anyone by failing to disclose the existence of the condemnation suit in its notice of exemption.

Specifically, U S Rail contends that it was unaware of the condemnation proceeding prior to filing the notice of exemption.<sup>2</sup> U S Rail thus argues that this case is unlike Jefferson Terminal.

U S Rail reiterates why none of the environmental thresholds would be exceeded here. U S Rail further argues that the fact that there is controversy in this case should not prevent the Board from allowing the notice of exemption to go into effect. U S Rail adds that SG has indeed constructed a private track on its property, and that no prior Board approval was necessary.

#### PRELIMINARY MATTERS

On August 30, 2007, the City filed a motion asking the Board to strike portions of U S Rail's August 17, 2007 rebuttal or, in the alternative, to accept its arguments refuting some of the applicant's assertions. U S Rail filed a reply in which it claims that the City's motion to strike is nothing more than a reply to a reply, a pleading prohibited by our regulations.<sup>3</sup>

We will accept the arguments proffered by the City and not strike U S Rail's arguments. The parties' pleadings and attached exhibits provide for a more complete record regarding the proposed transaction. For this same reason, we will also grant NJDEP's request to intervene in the proceeding.

#### DISCUSSION AND CONCLUSIONS

An exemption under 49 CFR Part 1150 Subpart E is void *ab initio* if the notice contains false or misleading information. 49 CFR 1150.42(c). U S Rail's notice of exemption (at 3) describes the property to be leased as "a rail-served transload terminal owned by Shannon," and the caption summary attached as Exhibit C to the notice states that the property to be leased is "currently owned by Shannon G." However, the record shows that, at the time the notice of exemption was filed on June 6, 2007, the City had begun a condemnation action – the very purpose of which was to end SG's ownership. Moreover, although U S Rail claims that it did not know about the condemnation proceeding when it filed its notice of exemption, we find that it did. The record shows that U S Rail leased the subject property from SG on August 10, 2006,<sup>4</sup> and that the City offered to buy the property in a letter dated February 13, 2007.<sup>5</sup> The record further shows that the City initiated the condemnation proceeding on April 25, 2007, by filing a verified complaint in state court. The City also submitted a fact certification by Gabriel Hall, as President and CEO of U S Rail, dated May 22, 2007, as evidence of U S Rail's acknowledgment of the condemnation proceeding.<sup>6</sup> That document demonstrates that, despite its assertion to the contrary, U S Rail had actual notice of the condemnation action before it filed its notice of exemption on June 6, 2007. We find that U S Rail's failure to disclose the condemnation action

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<sup>2</sup> See U S Rail's August 17, 2007 Reply, V. S. Hall at 1.

<sup>3</sup> See 49 CFR 1104.13(c).

<sup>4</sup> See NJDEP's August 10, 2007 Reply, Exhibit A.

<sup>5</sup> See City's July 26, 2007 Reply at 6.

<sup>6</sup> See City's Motion to Strike, filed August 30, 2007, at 2-3 and Appendix at 1.

in its notice of exemption renders the notice's assertions regarding SG's ownership of the property materially misleading by omission, rendering the notice void *ab initio*.

Additionally, Mr. Hall states in his verified statement on behalf of U S Rail that he learned of the condemnation proceeding and that a representative of NYS&W then advised him "to do what he had to do" and seek STB operating authority.<sup>7</sup> Not only does Mr. Hall's verified statement indicate that U S Rail was not candid in its notice of exemption, but the statement leaves us with the clear impression that U S Rail was attempting to use the federal preemption that the use of our notice of exemption process would confer on SG's property as a means of avoiding the City's authority to pursue the condemnation proceeding. In Jefferson Terminal, we found similar actions to be unacceptable.<sup>8</sup> These actions are unacceptable here too, and the false and misleading information U S Rail provided warrants rejecting the notice of exemption.

Because we are rejecting the notice of exemption, this proceeding is terminated.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NJDEP's motion to intervene is granted.
2. The City's motion to strike is accepted, but it is denied as described above.
3. As described above, U S Rail's notice of exemption is rejected, and this proceeding is terminated.
4. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan  
Acting Secretary

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<sup>7</sup> See U S Rail's July 3, 2007 Supplement, V. S. Hall at 3.

<sup>8</sup> See Jefferson Terminal, slip op. at 5.