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SERVICE DATE - JANUARY 30, 1998

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Finance Docket No. 32162

INDIANA HI-RAIL CORPORATION--LEASE AND OPERATION  
EXEMPTION--NORFOLK AND WESTERN RAILWAY COMPANY LINE  
BETWEEN ROCHESTER AND ARGOS, IN, AND--EXEMPTION  
FROM 49 U.S.C. 10761, 10762, AND 11144

and

No. 41671<sup>2</sup>

WILSON FERTILIZER & GRAIN COMPANY--PETITION FOR  
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES  
OF INDIANA HI-RAIL CORPORATION

Decided: January 22, 1998

In a decision served on March 31, 1993, the ICC granted Indiana Hi-Rail Corporation (IHR) exemptions under 49 U.S.C. 10505 from: (1) the prior approval requirements of 49 U.S.C. 11343 et seq. for the lease and operation of a 13-mile line of the Norfolk and Western Railway

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The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), enacted December 29, 1995, and effective January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by ICCTA. This decision relates to proceedings that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 721, 10502, 11101, 11144, and 11323. Therefore, this decision applies the law in effect prior to ICCTA, and citations are to the former section of the statute, unless otherwise indicated.

<sup>2</sup> These proceedings have not been formally consolidated; they are being handled together for administrative convenience.

Company (N&W),<sup>3</sup> between milepost I-95.6 at Rochester, IN, and milepost I-108.6 at Argos, IN (Rochester Line); (2) the tariff publishing requirements of 49 U.S.C. 10761-62; and (3) the record keeping requirements of 49 U.S.C. 11144. The decision was not appealed and became effective on May 1, 1993.

The Rochester Line is one of a pair of lines Central Railroad Company of Indianapolis (Central) leased from N&W in 1989.<sup>4</sup> Shortly after the Central/N&W lease was consummated, IHR, a Class III rail carrier, obtained authority to serve the Rochester Line under a trackage rights agreement with Central.<sup>5</sup> IHR subsequently entered into a new, direct lease with N&W, and, pursuant to an agreement with Central and N&W, it replaced Central as operator of the Rochester Line.<sup>6</sup>

On December 26, 1995, Wilson Fertilizer & Grain Company (Wilson), the only active shipper on the Rochester Line, filed a petition to revoke the exemption granted in the March 31, 1993 decision in Finance Docket No. 32162 and a petition for a declaratory order in No. 41671 with respect to charges IHR had assessed for demurrage, switching, and other unspecified services. Mr. R. Franklin Unger, IHR's Trustee (Trustee), responded by filing a request for waiver of the reply due date and a reply. Wilson did not object to the waiver request but filed a

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<sup>3</sup> N&W is a Class I rail carrier and a wholly subsidiary of Norfolk Southern Railway Company (NS).

<sup>4</sup> Central Railroad Company of Indianapolis--Lease & Operation Exemption--Line of the Norfolk and Western Railway Company, Finance Docket No. 31470 (ICC served July 25, 1989).

<sup>5</sup> Indiana Hi-Rail Corporation--Trackage Rights Exemption--Central Railroad Company of Indianapolis Finance Docket No. 31541 (ICC served Nov. 17, 1989).

<sup>6</sup> A joint petition for exemptions for Central to discontinue its lease and operation of the Rochester Line, for IHR to discontinue its trackage rights over the Rochester Line, and for N&W to abandon related track between Rochester and Kokomo, IN, was rejected in Central Railroad Company of Indianapolis--Discontinuance of Service Exemption--Between Kokomo and Argos, IN, Docket No. AB-289 (Sub-No. 1X) et al. (ICC served Nov. 22, 1994). Central's discontinuance request subsequently was exempted from regulation while IHR's request to discontinue its trackage rights was reported to be pending before the United States Bankruptcy Court for the Southern District of Indiana, Indianapolis Division (Bankruptcy Court). Central Railroad Company of Indianapolis--Discontinuance of Service Exemption--Between Kokomo and Argos, in Howard, Miami, Fulton, and Marshall Counties, IN, Docket No. AB-289 (Sub-No. 3X) et al. (STB served May 14, 1996).

response, arguing that the late-filed reply actually constituted a motion to dismiss. We are accepting both the late-filed reply and response, and we are denying the petition to revoke. Although we are also denying the petition for a declaratory order, we will provide guidance that may be of assistance to the parties.

Some of the issues in these proceedings appear to have been mooted by subsequent developments. On October 8, 1997, Fulton County, L.L.C. (FC), filed a verified notice of exemption under 49 CFR 1150.31 to acquire the Rochester Line from N&W and to operate over it. See Fulton County, L.L.C.--Acquisition and Operation Exemption--Norfolk and Western Railway Company, STB Finance Docket No. 33477 (STB served and published on Oct. 31, 1997, at 62 FR 59027). The exemption went into effect on October 15, 1997, and, based on filings made with the Board in Indiana Hi-Rail Corporation Trustee's Amended Plan of Reorganization and Disclosure Statement, STB Finance Docket No. 33491, in which we issued a decision on December 12, 1997, in response to a request by the Bankruptcy Court that we do so, the Bankruptcy Court has approved this sale transaction, among others, and directed that it go forward on December 18, 1997, with operations by FC to begin the same day. Because the records in Finance Docket No. 32162 and No. 41671 have not been updated to reflect these recent developments (and it appears unnecessary to delay issuance of a decision in these proceedings to update the records simply to ascertain the degree to which the proceedings are moot), we will proceed to resolve the matters before us without attempting to identify the issues that are now moot. The recent proceedings, however, reflect the fact that IHR is no longer providing the service about which Wilson is complaining in the present proceedings.

#### DISCUSSION AND CONCLUSIONS

Wilson contends that, since IHR was forced into chapter 11 bankruptcy on November 15, 1994, IHR repeatedly failed to provide adequate rail service in violation of its common carrier obligation under 49 U.S.C. 11101(a) and its obligation under the bill of lading contract. Wilson states that virtually every factor cited by the ICC for granting the exemptions in the March 31 decision has proven groundless, in light of IHR's poor service and unresponsive management. Contrary to the general findings in the March 31 decision, Wilson states, IHR: (1) could not provide same day switching service because of where it located its crews and the travel time involved in operating the 13-mile Rochester Line; (2) took as much as 5 to 7 days to deliver cars, and scheduled deliveries could be up to 3 days late because crews were not available on any consistent basis; (3) did not provide timely switching, which was essential to accumulate and load 50 to 100-car unit trains of grain in a prompt and efficient manner; and (4) failed, notwithstanding repeated assurances to the contrary, to make a significant track investment (e.g., tie replacement and track renewal), in violation of its lease with N&W.

Additionally, Wilson claims that IHR failed to make any effort to settle a claim for more than \$5,000 in damages that resulted from an accident in December 1994. According to Wilson,

an IHR engine hooked a storage bin that belonged to Rochester Metals (Rochester), the adjoining landowner, and ran it through one of Wilson's warehouses. The bin had been relocated and allegedly was obstructing the track leading to Wilson's facilities. IHR characterizes the accident as unavoidable and notes that Wilson was fully compensated for the damage by Rochester's insurance company in due time. In its reply, Wilson contends that the engine could have, and should have, stopped if the clearance was inadequate because of the new position of the bin. According to Wilson, the accident primarily demonstrates that IHR's crew failed to use due care, and it attributes the failure to inadequate instruction and supervision.

Wilson states that it is dependent on IHR for rail service but that, since the November 15, 1994 bankruptcy filing, rail service has been deplorable and IHR's response to its many complaints has been negligible. Wilson contends that NS increased the grain rates from Rochester because of the poor equipment turnaround; that it experienced a substantial loss of business, including two unit train customers, and a significant reduction in rail traffic volume because of the deteriorated rail service provided by IHR, and that it had to give serious consideration to closing its facilities and terminating its grain elevator business at Rochester.

Aside from its comments relating to the accident, IHR basically claims that the problems cited by Wilson reflect the normal type of commercial and/or operational disputes that arise between a carrier and a shipper. It otherwise attributes the delays in releasing cars to NS, which allegedly required the payment of outstanding bills as a condition to car release.

1. The Lease and Operation Exemption. Under 49 U.S.C. 10505(d), an exemption may be revoked, in whole or in part, when the application of a provision of subtitle IV of Title 49 to a person, class, or transportation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a. To justify revocation, a petitioner must meet its burden of proof by articulating reasonable, specific concerns under the revocation criteria. Portland & Western Railroad, Inc.—Lease and Operation Exemption—Lines of Burlington Northern Railroad Company, Finance Docket No. 32760 (STB served Oct. 15, 1997). When, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and, under 49 CFR 1115.3(b), it must state in detail whether revocation is supported by material error, new evidence, or substantially changed circumstances.

No specific time limits apply to the filing of petitions to reopen and revoke exemptions granted under 49 U.S.C. 10505. However, the time elapsed is relevant and may be a factor in ruling on the merits of a request to reopen and revoke an exemption, particularly when the exemption pertains to a transaction that cannot readily be undone. As relevant here, Wilson was served with copies of IHR's petition for exemption and the March 31 decision. IHR went into bankruptcy on November 15, 1994, after which, apparently, its service quickly deteriorated. Yet, Wilson did not object in any way to the fact that IHR was operating under the exemption until the instant petition to revoke was filed, more than 2 1/2 years after the decision had become

effective and the transaction had been consummated, and over 13 months after the apparent deterioration in service. When so much time has elapsed, concerns for administrative finality, repose, and detrimental reliance must be balanced against any benefits to be derived from reopening and revocation of the exemption. See Greater Boston Television Corp. v. FCC, 463 F.2d 268, 289 (D.C. Cir. 1971); Chicago & N.W. Ry. Co. v. United States, 311 F. Supp. 860, 863 (N.D. Ill. 1970); and S.R. Investors, Ltd., Doing Business as Sierra Railroad Company--Abandonment--In Tuolumne County, CA, Docket No. AB-239X (ICC served Jan. 26, 1988), slip op. at 9. Moreover, as discussed later, revocation would not result in any benefits to Wilson.

We find that, under 49 U.S.C. 10505(d), Wilson has failed to justify the reopening and revocation of the lease and operation exemption. Wilson has not alleged that the March 31 decision contained material error or relied on false or misleading information. Nor has it argued that the evidence of record failed to support the ICC's finding that the lease and operation exemption was consistent with the rail transportation policy. Instead, its argument in support of reopening essentially relies on new evidence and substantially changed circumstances. In effect, Wilson argues that, since the November 15 bankruptcy filing, rail service has deteriorated from an acceptable level under JHR's prior leases with Central and N&W to a level where revocation was necessary to subject the transaction to full regulatory review under the public interest standards of 49 U.S.C. 11343 et seq.

At the outset, we note that exemptions from prior approval requirements may not be revoked simply because the transaction subsequently fails to live up to the expectations of the parties and/or the affected public, respectively, who sought or supported it. Subjecting exempted transactions to requests for reopening and reconsideration, with hindsight as the dominant consideration, would place an intolerable burden on the exemption process. A burden of this nature would constitute a disincentive to the exemption process and, as such, would be inconsistent with the legislative intent to encourage the use of exemptions. See H.R. CONF. REP. 1430, 94th Cong., 2d Sess. 105 (1980).

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Wilson seeks to subject the transaction to the public interest standards of 49 U.S.C. 11343, but under section 11343(d), we must approve finance applications that do not involve the merger or control of at least two Class I rail carriers if there are no anticompetitive effects, regardless of other public interest considerations. Only if we find anticompetitive effects are we required to weigh them against the public interest in meeting significant transportation needs. See Montana Rail Link, Inc.--Lease and Operation--Burlington Northern Railroad Company, Finance Docket No. 32144 (ICC served Sept. 28, 1992), slip op. at 2; and Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company--Control--Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311 (STB served May 1, 1997), slip op. at 4.

The rail service provided by IHR under the lease and operate exemption apparently was satisfactory until the bankruptcy filing. The bankruptcy filing, however, does not establish error in the ICC's March 31 decision or provide a basis for revoking the exemption that was granted. Moreover, revoking the exemption will do nothing to give Wilson the level of service it seeks. Indeed, a new operator is now on the line and, as a consequence, this aspect of the case is essentially moot. Accordingly, Wilson's petition to reopen and revoke IHR's lease and operation exemption will be denied.

Wilson had alternative remedies available to it, short of revocation, once service deteriorated after the bankruptcy filing. For example, it could have filed a complaint challenging the adequacy of rail service under 49 U.S.C. 11101(a) and 11121(a)(1).<sup>8</sup> Additionally, it could have filed a feeder line application under 49 U.S.C. 10910. Revocation of the exemption simply was not necessary or appropriate to obtain better service from IHR.

2. The Tariff Publishing and Record Keeping Exemptions. As with the lease and operate exemption, Wilson does not allege material error, reliance on false and misleading information, or inadequate evidentiary support in connection with the ICC's decision exempting IHR from the tariff filing requirements of 49 U.S.C. 10761-62 and the record keeping requirements of 49 U.S.C. 11144. Instead, it bases its revocation request on a balance due statement for \$49,142.47 in charges that it received from the Trustee on November 10, 1995. The statement supposedly concerns demurrage, switching, and other miscellaneous charges that allegedly accrued on shipments that moved between December 4, 1991, and September 30, 1995, but it does not indicate the total charges by category or identify, for the most part, the specific nature of any individual charge or whether the charge is related to an inbound or outbound movement. In response to its request for information concerning the justification or basis for the charges, Wilson contends that it was given only a copy of a so-called "demurrage policy," a rate publication which purportedly was issued under IHR's tariff publishing exemption and became effective on January 1, 1994. Wilson states that the demurrage policy did not have an ICC tariff publication number or an ICC filed or effective date.

The same basic reopening and revocation standards that governed the lease and operation exemption apply here, except that the issues of repose and detrimental reliance are not likely to arise in connection with exemptions from tariff publishing and other statutory requirements of a continuing nature. Moreover, the submission of new evidence or evidence of substantially

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<sup>8</sup> Although it is settled that rail carriers are not required to maintain fleets sufficient to meet peak demand for grain movements, see Anderson Grain Corporation v. American Railway Corporation and Seagraves, Whiteface and Lubbock Railroad Company, No. 41601 (ICC served Dec. 5, 1995), there clearly was enough latitude for Wilson to argue that, under the circumstances, IHR was not providing adequate rail service.

changed circumstances is permissible, if not necessary, in connection with petitions to reopen exemptions of this type and to make a showing that regulation has become necessary to carry out the rail transportation policy of 49 U.S.C. 10101a.

Wilson argues that IHR's attempt to assess and collect the disputed charges is illegal even if the rate publication was appropriate under IHR's tariff filing exemption. Arguing that it never agreed to the demurrage charges or entered into any contractual understanding relating to their imposition, Wilson maintains that their unilateral imposition constitutes both an abuse of the exemption authority and an abuse of market power and that it justifies revoking the tariff publishing exemption. Wilson also requests that a declaratory order be issued finding IHR's attempt to collect the assessed charges illegal.

a. Revocation. Under ICCTA, the tariff publishing requirements of 49 U.S.C. 10761-62 were repealed and replaced with the notice, disclosure, and publication requirements of 49 U.S.C. 11101.<sup>2</sup> In Disclosure, Pub. & Notice of Change of Rates—Rail Carriage, 1 S.T.B. 153, 164 (1996), we declined to apply our regulations implementing the new requirements of section 11101 to the extent a transportation or service remains exempted under 49 U.S.C. 10505 from the tariff publishing requirements of sections 10761-62 (or under 49 U.S.C. 10502 from the new notice, disclosure, and publication requirements of section 11101). See 49 CFR 1300.1(d). Thus, previously granted tariff publishing exemptions remain outstanding and continue in effect. Under section 10505(d), these previously granted exemptions may be reopened and revoked, which would subject formerly exempted rates and service terms to the notice, disclosure, and publication requirements of section 11101.

We find no merit to the argument that IHR's attempt to impose and collect demurrage and switching charges is illegal or constitutes an abuse of market power so as to justify revocation simply because it was initiated by the carrier unilaterally. Regardless of whether demurrage rules

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<sup>2</sup> Under 49 U.S.C. 11101(b), rail carriers must promptly disclose their rates and other service terms to any person, on request, and promptly forward them in writing or make them available in electronic form, if requested. Additionally, under 49 U.S.C. 11101(c), rates may not be increased or service terms changed unless 20 days have expired after written or electronic notice is provided to a person who, within the previous 12 months, made a request under subsection (b), or made shipping arrangements that would be affected by the increase or change. With respect to agricultural products (which "include[s] grain . . . and all products thereof and fertilizer"), 49 U.S.C. 11101(d) specifies that rail carriers, in addition to being subject to the new notice and disclosure requirements of sections 11101(b) and (c), must publish their rates, schedules of rates, and other service terms; must make them available; and must retain them for public inspection.

and charges were established individually or collectively,<sup>10</sup> by tariff publication or exemption, carriers were never obligated to consult with shippers or to be responsible for obtaining their consent. Railroads Per Diem, Mileage, Demurrage and Storage Agreement, 1 I.C.C.2d 924, 935 (1985). Tariff-published demurrage rules and charges, like any other tariff matter, could be challenged by the filing of a protest under 49 U.S.C. 10707, before they became effective, and by the filing of a complaint under 49 U.S.C. 11701(b), after they became effective.

Under the tariff publishing exemption, IHR was entitled to adopt and apply rate-related rules and charges unilaterally and without regard to the tariff publishing requirements of 49 U.S.C. 10761-62. Wilson, on the other hand, was entitled to seek reopening and revocation of the tariff publishing exemption, in whole or in part, by showing under 49 U.S.C. 10505(d) that IHR's demurrage policy constituted an abuse of market power or that tariff publication under sections 10761-62 was otherwise necessary to carry out the rail transportation policy of 49 U.S.C. 10101a.

As we discuss later, the evidence of record suggests that IHR was not entitled to collect demurrage and other disputed charges. Nevertheless, we find that revocation under the circumstances is inappropriate. Revocation would only result in the application of the post-ICCTA publication requirements, which, even if applicable, would not preclude IHR from seeking to collect charges to which it was really not entitled. But more significantly, as with the lease and operate exemption, IHR no longer operates the line, and so revocation would achieve nothing. Accordingly, Wilson's petition to reopen and revoke the tariff publishing and record keeping exemptions granted in the ICC's March 31 decision will be denied.

b. Declaratory Order. Under 5 U.S.C. 554(e) (section 554(e) of the Administrative Procedure Act) and 49 U.S.C. 10321 (49 U.S.C. 721 following enactment of ICCTA), we may, in the exercise of our discretion, issue a declaratory order to terminate a controversy or remove uncertainty. We are denying Wilson's request for a declaratory order in No. 41671. We will, however, provide some guidance that may be of some assistance to the parties. In particular, we note that the assessment and collection of demurrage and switching charges does not appear to be inappropriate in this instance, but, as we have already noted, the evidence of record suggests that IHR was not the carrier entitled to assess and collect them.

Rail carriers, under 49 U.S.C. 10702, must establish reasonable rates and rate-related rules and practices and, under 49 U.S.C. 10750, must compute demurrage charges and establish demurrage rules to facilitate freight car use and distribution and to maintain an adequate supply

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<sup>10</sup> Antitrust immunity for the collective establishment of demurrage charges and practices was terminated in Exemption of Demurrage from Regulation, Ex Parte No. 462 (STB served Mar. 29, 1996).

of freight cars. Demurrage charges are assessed for the undue detention of rail equipment; they are assessed and retained by the railroad on whose line the detention occurs. South Carolina Rys. Com. v. Seaboard Coast L. R., 365 I.C.C. 274, 277 (1981) (South Carolina). The charges are intended to compensate rail carriers for expenses incurred when cars are detained. Thus, they serve as a penalty to discourage shippers and receivers from detaining cars. Chrysler Corp. v. New York Central R. Co., 234 I.C.C. 755, 759 (1939).

In support of the tariff publishing exemption, IHR originally stated that it "operates the Rochester Line as a switching carrier, and its charges are included in the line-haul rate published by N&W." (March 31, 1993 decision, slip op. at 3.) Wilson's petition to revoke and reply confirm that NS's line-haul rates applied to the movements to and from Rochester and that freight charges were paid directly to NS.<sup>11</sup> As a consequence, the evidence of record suggests that NS, and not IHR, was entitled to assess and collect demurrage charges and any other charges that accrued, notwithstanding that they were incurred on IHR's line.<sup>12</sup> Therefore, it does not appear that IHR was the proper carrier to collect demurrage or any other charges.<sup>13</sup>

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

It is ordered:

1. The late-filed reply and response are accepted into the record.
2. The petition to reopen and revoke in Finance Docket No. 32162 and the petition for a declaratory order in No. 41671 are denied, and these proceedings are discontinued.
3. This decision is effective on its service date.

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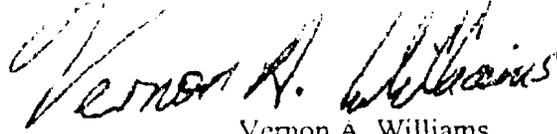
<sup>11</sup> For example, Wilson blames IHR's service failures for NS's increase in the line-haul grain rates on movements from Rochester, and states that it would pay NS's freight charges a few days in advance of delivery by IHR to prevent any problems.

<sup>12</sup> While IHR performed switching services for N&W, it does not appear to have been either a terminal switching carrier, as was the case in South Carolina, or a line-haul participant in joint rates to and from Rochester.

<sup>13</sup> We note that IHR's "demurrage policy" did not even become "effective" until a large number of shipments on the Trustee's statement had moved. We also note that collection of many of the charges appears to be time-barred under either the 2-year statute of limitations pertaining to lawfulness, 49 U.S.C. 11706(c)(1), or the 3-year statute of limitations pertaining to applicability, 49 U.S.C. 11706(a).

Finance Docket No. 32162 et al.

By the Board, Chairman Morgan and Vice Chairman Owen.

A handwritten signature in cursive script that reads "Vernon A. Williams". The signature is written in dark ink and is positioned above the printed name and title.

Vernon A. Williams  
Secretary