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SERVICE DATE - LATE RELEASE JULY 7, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33587

CITY OF ROCHELLE, ILLINOIS
--NOTICE OF EXEMPTION--
COMMENCEMENT OF RAIL COMMON CARRIER OBLIGATIONS

Decided: July 6, 1998

We are denying the petitions of the Rochelle Railroad Company (RRC) and intervener Americold, Inc. (Americold) to revoke the notice of exemption filed in this proceeding by the City of Rochelle, IL (the City) for the commencement of railroad operations.

BACKGROUND

By notice filed on April 28, 1998, and published in the Federal Register on June 2, 1998, at 63 FR 30036, the City invoked our class exemption at 49 CFR 1150.31 to assume rail common carrier operations over 2.06 miles of track that it owns in an industrial park within its city limits. The notice became effective on May 5, 1998.

RRC is currently operating on the line. The City asserts that RRC has been operating on the line under a lease but that the lease has been canceled. In a preliminary motion filed in STB Docket No. AB-549, City of Rochelle, Illinois -- Adverse Abandonment -- Rochelle Railroad Company, the City has expressed an intention to file an adverse (involuntary) discontinuance application in order to obtain authority to expel RRC from the line. The City, however, maintains that its notice of exemption gives it the authority to operate on the line until an adverse discontinuance is granted, despite the presence of RRC. The City maintains that, pending our approval of an adverse discontinuance application, both carriers will have the right to operate on the line, but that shippers on the line have the right individually to designate which carrier will serve them.

On April 30, 1998, Americold filed a petition to intervene and to reject and/or revoke the notice of exemption.¹ By petition filed on May 1, 1998, RRC requests that we reject and/or revoke the notice of exemption. RRC filed a supplement to this petition on May 8, 1998. On May 21, 1998, the City filed a reply to RRC's petition to reject and/or revoke.²

¹ We grant Americold's petition for intervention because it is an "interested person" under 49 CFR 1152.25(a).

² On May 28, 1998, the City filed nonsubstantive corrections to its reply.

DISCUSSION AND CONCLUSIONS

RRC argues that we should reject or revoke the exemption on the grounds that: (1) it does not conform to our rules of practice at 49 CFR 1104, allegedly due to improper service and lack of verification; (2) the notice is void ab initio, allegedly for containing false and misleading information; and (3) the notice presents exceptional circumstances requiring regulation of the transaction.

Rejection. Our rules governing the method of service provide as follows at 49 CFR 1104.12(a):

(a) Generally. Every document filed with the Board should include a certificate showing simultaneous service upon all parties to the proceeding. Service on the parties should be by the same method and class of service used in serving the Board, with charges, if any, prepaid. One copy should be served on each party. If service is made on the Board in person, and personal service on other parties is not feasible, service should be made by first-call or express mail. When a party is represented by a practitioner or attorney, service upon the practitioner is deemed to be service upon the party.

RRC argues that the notice must be rejected because it was not served upon RRC by the "same method and class of service used in serving the Board." According to RRC, the notice was served by hand on the Board. RRC asserts that it obtained a FAX copy from counsel for the City after the filing at the Board was called to its attention through a "daily" list of filings provided by an outside watching service. RRC asserts that the mailed (non-FAX) copy "has yet to arrive." RRC argues that the City's notice should be rejected because RRC was prejudiced by this method of service.

We disagree. Under our regulations, notices of exemption are initially required only to be filed with the Board. Notice upon potentially interested parties like RRC is satisfied by publication in the Federal Register. The notice was not required to be served on RRC because RRC was not a party when the notice was filed with the Board. Moreover, the purpose of the above quoted regulation is to ensure that parties do not disadvantage each other by the use of inferior filing methods. This purpose was not contravened here. RRC received the FAXed document sufficiently early to file its petition to revoke before the City's notice was published in the Federal Register.

Under 49 CFR 1150.32(a), notices of exemption must be "verified." RRC argues that the notice must be rejected because its only verification is a one-page affidavit from its City Manager attesting to the monthly car counts, rather than an affidavit attesting to the entire notice.

We disagree. While a broader verification should have been filed, the City's error in this respect does not require rejection of its notice. The City has attached to its reply a broad verification

addressing all factual issues raised in the notice. This fulfills the purpose of the verification requirement.

RRC maintains that the notice is void ab initio on the grounds that it falsely identifies the common carrier and makes other misrepresentations. RRC asserts that there has been confusion in filings before the Board as to the identity of the entity that will conduct operations on behalf of the City and that this is grounds for finding that the notice is void ab initio.

We disagree. The notice makes the identity of the serving railroad perfectly clear -- it is the City. The City will be the licensed rail carrier that is responsible for the provision of service in a lawful manner. While the City has referred to the "operator" of the line by various names, it appears that the operator will be nothing more than an agent of the City and that the City "will assure that all common carrier obligations are fulfilled."³ The agents or employees hired by the City to fulfill its common carrier obligation will not need authority from the Board. Because such agents or employees will not be responsible to shippers for the provision of service, regulated carriers like the City are not required to identify them.

RRC asserts that the City has incorrectly stated that only one of the three current shippers, Edward Hines Lumber Company, is interested in continuing to use RRC.

Intervener Americold states that it is also interested in using RRC. This, however, is not grounds for revoking the notice. The issue of shipper support for RRC will be resolved in the adverse discontinuance application that the City has expressed an intent to file in STB Docket No. AB-549.

RRC also alleges that the City misrepresents the ability of its contractor, Total Logistics, Inc., to conduct operations on behalf of the City.

We will not reject the notice based on this allegation. As discussed above, the operating authority and common carrier obligation will belong to the City, not its agent. It would be premature to conclude that the City will not be able to provide safe, adequate service or will attempt to commence operations before it can do so safely and efficiently.

Finally, RRC alleges that "evidence of traffic tendered to or received by the three on line shippers [in the form of car counts and percentages] is at odds with traffic records kept by the railroad." We will not reject the notice based on that allegation. As noted by the City in its reply (at 4 n.4), the discrepancy can be explained by differences in measurement periods.

Revocation. Under 49 U.S.C. 10502(d), we may revoke an exemption if regulation is necessary to carry out the transportation policy of 49 U.S.C. 10101. RRC argues that the

³ Reply of the City, at 4.

transaction should be subject to regulation on the grounds that it contravenes goals in the transportation policy of 49 U.S.C. 10101 requiring avoidance of predatory practices, market concentration, adverse effect on safety, and unlawful discrimination.

The transaction does not require regulation to avoid predatory practices. The term "predatory pricing and practices" in 49 U.S.C. 10101(12) refers to the pricing and practices that one carrier observes relative to another, competing carrier. Here, RRC has submitted no evidence of predatory pricing or practices.

There are no grounds for regulating the transaction to avoid market concentration under 49 U.S.C. 10101. The entry of the City into the railroad market as a competitor to, or a replacement of, RRC will not increase market concentration.

Nor are there grounds for finding that service by the City will produce discrimination in violation of the narrow strictures contained in the ICC Termination Act. The City competes with no users of rail service and has no motivation to discriminate in favor of one to the detriment of another.

Finally, we see no reason to revoke the notice on the grounds that operations by the City on the line will adversely affect safety. In a similar situation in Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance, Finance Docket No. 32049, renumbered No. AB-379X (ICC served July 21, 1992, Aug. 31, 1992, and Nov. 4, 1992), and The Central of Tennessee Rail and Navigation Company, Incorporated--Modified Rail Certificate, Finance Docket No. 32049 (Sub-No. 1)(ICC served July 21, 1992, and Aug. 31, 1992), the ICC directed two carriers holding authority over the same line to operate in coordination pending a decision on whether one of the carriers would have to exit pursuant to a petition for discontinuance sought by the other (Aug. 31, 1992 decision at 2). Here, we of course expect that both RRC and the City will coordinate operations and operate in conformity with the regulations of the Federal Railroad Administration and all other applicable safety laws.

In finding that 49 U.S.C. 10502(d) does not support revocation of the notice of exemption filed by the City and that nothing in the ICC Termination Act or the regulations and precedents of the Board preclude the City from operating over this track, we do not purport to rule on the respective rights of RRC and the City to operate. Our determination of whether RRC service must continue will be made in the adverse discontinuance proceeding.

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

It is ordered:

1. The petition to revoke and/or reject is denied.

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2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary