

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34540

THE COLUMBUS & OHIO RIVER RAIL ROAD COMPANY—  
ACQUISITION AND OPERATION EXEMPTION—RAIL LINES OF CSX  
TRANSPORTATION, INC.

Decided: February 22, 2005

On September 24, 2004, The Columbus & Ohio River Rail Road Company (CUOH), a Class III rail carrier, filed a verified notice of exemption under 49 CFR 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.<sup>1</sup> 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)<sup>2</sup> between milepost 16.7 and milepost 18.2 in Zanesville, OH.<sup>3</sup> Notice of the exemption was published in the Federal Register (69 FR 61702) on October 20, 2004, and was served on October 21, 2004.

On October 22, 2004,<sup>4</sup> 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

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<sup>1</sup> The line to be leased consists of the Lake Erie Subdivision (Newark to Mt. Vernon) and the Central Ohio Subdivision (Newark to Cambridge).

<sup>2</sup> OSR and CUOH are subsidiaries of Summit View, Inc., a noncarrier holding company.

<sup>3</sup> Prior to this transaction, CUOH and the Ohio Central Railroad (OHCR) interchanged traffic at Morgan Run (Coshocton), OH. Following this transaction, CUOH and OHCR will interchange traffic at both Coshocton and Zanesville.

<sup>4</sup> Although the supplemental notice was submitted on October 22, 2004, the required filing fee of \$1,400 was not received until October 28, 2004, which therefore constitutes the actual filing date of the supplemental notice.

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.

BLET's protest and UTU's petition to revoke raise issues that require further consideration by the Board. By this decision, the Board is instituting a proceeding under 49 U.S.C. 10502(d) to consider these filings.

As noted, UTU has sought discovery from CUOH in this proceeding. Specifically, in letters dated October 21, 2004, October 28, 2004, and January 24, 2005, UTU has requested that the carrier produce: (1) copies of leases and other written arrangements between CUOH, CSXT, and/or the Ohio Department of Transportation, including those that bear on the CUOH leases and operations at issue in this proceeding; (2) copies of written arrangements between CSXT, the State of Ohio, OSR, OCHR, and/or CUOH regarding ownership or other interests in the line prior to the effective date of the transaction at issue; and (3) copies of any operating agreement between CUOH, CSXT, and/or the State of Ohio regarding the C&N subdivision (the subject line between Columbus and Newark).

CUOH opposes UTU's discovery requests, claiming that UTU failed to submit its request when it filed its initial petition to revoke, citing 49 CFR 1121.2 and Expedited Procedures for Processing Rail Rate, 1 S.T.B. 754, 772 (1996) (Expedited Procedures). CUOH notes that UTU did not submit its discovery request until 5 weeks after it first sought to revoke the exemption. CUOH contends that UTU therefore waived its right to discovery.

While it did not include a discovery request with its initial revocation request, UTU argues that it need not have done so under the Board's rules. That is its position because it filed its initial revocation request in this proceeding prior to the filing of CUOH's notice of exemption, inferring that it would not have had the information at that time upon which to formulate proper discovery requests. UTU asserts, moreover, that the Board's rules at 49 CFR 1121.4(f) do not prohibit the same party from filing a second petition to revoke in the same proceeding and seeking discovery at that time.

UTU's renewed motion to compel will be granted. The material sought through discovery appears to be limited in scope, relevant to the issues raised by UTU, and readily available from the carrier. The production of the material should assure that petitioner has adequate information available to pursue its revocation request. The parties may seek a protective order for any confidential material provided in discovery.

CUOH's objections concerning the lack of timeliness of UTU's document request ignore the fact that the carrier filed a supplemental notice of exemption here. Because a new notice of the amended transaction had to be published, the timeliness of subsequent filings is determined based on the republication date. As noted above, notice was republished on December 20, 2004. UTU filed its supplemental petition to revoke on January 25, 2005, incorporating its prior discovery request, and UTU renewed its motion to compel on January 26, 2005. Accordingly, UTU's document request will be considered timely filed.

Moreover, while parties always are urged to comply fully with the Board's rules at all times during a proceeding, the provision relied upon by CUOH at 49 CFR 1121.2 is intended in large part to allow a petitioner to conduct discovery expeditiously so that it may use the information produced to support the institution of a revocation proceeding under 49 U.S.C. 10502(d) within the 90-day period provided by the statute for the Board to decide whether to institute such a proceeding. See Expedited Procedures, 1 S.T.B. at 772. Here, the Board already has decided to institute such a proceeding. Thus, given all of the circumstances present in this case, UTU's alleged failure to have fully complied with the above-cited rule in seeking discovery does not warrant denying UTU the opportunity to conduct discovery in this proceeding. See Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption — CSX Transportation, Inc., STB Finance Docket No. 34536 (STB served Nov. 23, 2004).

To accommodate the pending discovery request, the following procedural schedule is set. Discovery must be completed within 10 days from the service date of this decision. UTU's

supplement to its petition to revoke is due by March 21, 2005. CUOH's reply is due by April 5, 2005.

It is ordered:

1. Under 49 U.S.C. 10502(d), a proceeding is instituted to consider BLET's protest and UTU's petition to revoke.

2. UTU's motion to compel is granted.

3. Discovery must be completed by March 4, 2005.

4. UTU's supplement to its petition to revoke is due by March 21, 2005.

5. CUOH's reply is due by April 5, 2005.

6. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary