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SERVICE DATE - APRIL 20, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

Ex Parte No. 346 (Sub-No. 33)

RAIL GENERAL EXEMPTION AUTHORITY--EXEMPTION
OF PAINTS, ENAMELS, LACQUERS, SHELLACS, ETC.

Decided: April 10, 1998

BACKGROUND

In Ex Parte No. 346 (Sub-No. 29), Rail General Exemption Authority--Petition of AAR To Exempt Rail Transportation of Selected Commodity Groups, the ICC addressed a proposal by the Association of American Railroads (AAR) to exempt from regulation the rail transportation of 31 Standard Transportation Commodity Code (STCC) commodity groups. The Commission granted exemptions for 19 of the commodity groups. The AAR withdrew its exemption proposal for six others. For the remaining six, AAR asked the ICC to institute five separate sub-proceedings.² In

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10701 and 10502. Section 204(b)(1) of the 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 the ICCTA. However, because of the nature of the action in this proceeding--a petition for the establishment of a class exemption that would apply to future transportation and related future filings--we have considered both the new and the old law in issuing our decision here. Citations are to the current sections of the statute, unless otherwise indicated.

² The five proceedings include this one and four others: Ex Parte No. 346 (Sub-No. 30), Rail General Exemption Authority--Exemption of Rock Salt and Salt (ICC served Oct. 6, 1994); Ex Parte No. 346 (Sub-No. 31), Rail General Exemption Authority--Exemption of Grease or Inedible Tallow (ICC served Dec. 9, 1994); Ex Parte No. 346 (Sub-No. 32), Rail General Exemption
(continued...)

this case, which is one of those sub-proceedings, the ICC, at the request of the AAR, proposed an exemption for paints, enamels, lacquers, shellacs, and the other products that are classified as part of STCC 28-5 (collectively, paints).

The notice initiating this proceeding presented traffic, revenue, and revenue-to-variable cost (R/VC) ratio data for these commodities. We invited comment on those data and requested additional data bearing on the transportation characteristics and the rail market share of paints. AAR, on behalf of its members and ten railroads individually, responded in support of the exemption;³ the Chemical Manufacturers Association (CMA)⁴ and Patrick W. Simmons, Illinois Legislative Director for the United Transportation Union (UTU-IL), filed in opposition.

Paints and related substances included in STCC 28-5 comprise a broad category of fluids used in the protection and coating of surfaces, as well as components of these coatings. While the products that make up this commodity group normally are not interchangeable, they share some common transportation characteristics. Paints are transported in liquid form, either in containers (drums, buckets or cans) by truck, or in bulk in tank trucks or rail tank cars. Truck moves are performed by commercial motor carrier, private fleets, and/or railroads in TOFC/COFC service. Tank cars normally are owned or controlled by the shippers.

POSITIONS OF THE PARTIES

The rail tonnage of paints carried by rail represented 6.4% of total U.S. paint production in 1992.⁵ These rail volumes and market shares may be understated, because paint also moves under

²(...continued)

Authority--Exemption of Carbon Dioxide (ICC served Nov. 18, 1994); and Ex Parte No. 346 (Sub-No. 34), Rail General Exemption Authority--Exemption of Hydraulic Cement (ICC served July 14, 1995, and Dec. 17, 1996). The exemptions were granted in those four proceedings.

³ The railroads' verified statements include statements by: Francis D. Brosnan, Jr., Director - Commercial Products Marketing, CSX Transportation (CSX); John F. Danstrom, Director, Chemicals, Norfolk Southern Corporation (NS); and Craig F. Rockey, Assistant Vice President, Economics and Finance, AAR. Together, NS and CSX account for about 15% of all ton-miles and 17% of all revenues from paints moving in tank cars, according to waybill data.

⁴ CMA filed summary comments on November 22, 1993 (CMA Comments, November 22), which specifically incorporate, by reference, its May 6, 1993 comments in the Sub-No. 29 proceeding (CMA Comments, May 6). The May comments include a statement by Charles L. Carroll, which includes analyses of the transportation characteristics of various chemical products, including paints.

⁵ V.S. Rockey, pp. 4-5. Witness Rockey cites U.S. Department of Commerce, Current (continued...)

“freight-all-kinds” (FAK) rates, which do not identify the commodities carried.⁶ Paint was shipped by rail from 20 origin states and provinces to 28 destination states and provinces, between 70 origin-destination state/province pairs.

Based on these data, the AAR claims that the transportation of paints is dominated by motor carriers and that rail participation in the traffic is “extremely small,” amounting to “only a few thousand carloads a year nationwide.”⁷ CMA agrees, but notes: “It is evident, however, that there are really two quite distinct types of movements of these products . . . that for finished products . . . [and] . . . bulk movements by tank car.” The testimony of AAR witness Brosnan appears to offer support for CMA’s argument. Witness Brosnan states:

Indeed, much of the transportation of these products is from manufacturer direct to the retail outlets for sale to the consuming public. Trucks dominate this market, since shipments of well under a carload or even a truckload predominate. Rail participation in the market is predominantly inter-plant or inter-company moves of bulk product in tank cars. (Emphasis added)⁸

The AAR, citing the court's language in Coal Exporters Ass’n of the United States, Inc. et al. v. United States et al., 745 F.2d 76, (D.C. Cir. 1984), cert. denied, 471 U.S. 1072 (1985) (Export Coal), notes that a finding of effective competition is not necessary for an exemption, but that such a finding has generally been an important factor in previous agency exemption decisions.⁹ But CMA also cites language in the Court of Appeals' decision reversing the exemption in Export Coal that appears relevant to this issue:¹⁰

Though competitive forces may exist and somewhat constrain railroad power, when they nevertheless do not rise to the level of “effective competition” ICC must explain why reliance on them is

⁵(...continued)

Industrial Reports - Paint and Allied Products (Series MA28F).

⁶ V.S. Brosnan, p. 2.

⁷ AAR, Comments, p. 3.

⁸ Verified Statement of Francis D. Brosnan, in Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups (V.S. Brosnan, 1992), p. 3; referenced in V.S. Brosnan, November 19, 1993, p. 1.

⁹ AAR, Comments, p. 19.

¹⁰ Export Coal, 745 F.2d at 98; as found at CMA, Comments, May 7, 1993, p. 5.

sufficient to protect those interests of shippers protected in the Act and alluded to in the policy declarations of [former] Sections 10101a(6) and 10505(a)(2)(B).

In defense of the proposed exemption, AAR cites its interpretation of past agency exemptions, such as Boxcar Traffic, which relied in large part on broad evidence of the existence of competition for the service sought to be exempted and on court opinions upholding the agency's actions.

AAR contends that the railroads' small share of paint traffic demonstrates that the requested exemption will be limited in scope. Paint accounts for 11,000 to 12,000 rail carloads per year, which accounts for only 6% of the total volume of paint traffic. According to AAR, the scope of the proposed exemption is even more limited than those figures would suggest. Approximately 40% of rail traffic moves in boxcar or TOFC/COFC movements.¹¹ Of the remainder, at least 60% is governed by rail transportation contracts. Accordingly, AAR contends, only a very small subset of the very few rail movements would even be affected by this exemption.

AAR notes that no shipper in recent years has sought regulatory review of any rail rate or practice regarding the carriage of paint. AAR also asserts that it has shipper support, citing the National Industrial Transportation League's favorable testimony in the initial (Sub-No. 29) proceeding in which AAR proposed the exemption of 31 commodities, including paint.

CMA challenges the arguments of the AAR. According to CMA, the fact that, on average, movements within a particular commodity group are competitive does not lessen the possibility that some of the movements do not enjoy competition. CMA contends that it would be unreasonable to require CMA and its members to rebut the aggregate information presented in support of these exemptions with specific information on individual shipments. CMA notes that information submitted in its May 6, 1993 comments in Ex Parte No. 346 (Sub-No. 29) shows that those shipments that move in bulk, in equipment that is likely to be shipper provided (i.e., in tank cars or covered hopper cars), are likely to be rail captive if moving for distances of greater than 300 miles, and almost certain to be rail captive if moving distances greater than 600 miles.

UTU-IL opposes these exemptions on the ground that “. . . the absence of government regulation (or the potential for regulation) tends toward a reduction in competition--and the reduction in transportation movement” As evidence of a decline in transportation movement and of "freedom not to compete," UTU-IL cites statistics on the reduction in the number of locomotives, freight cars and track mileage over the prior 10 years.¹²

¹¹ V.S. Rockey, p. 5.

¹² UTU-IL, Comments, p. 2.

DISCUSSION AND CONCLUSIONS

Section 10502 (49 U.S.C. 10502) requires that the Board exempt a transaction or service whenever application in whole or in part of a provision:

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

The rail traffic subject to regulation is the tank car carriage of paint. Most of the traffic appears to involve intermediate products or finished products for industrial use, moving in shipper-owned or controlled cars. At 1992 levels, the exemption under consideration in this sub-proceeding would affect about \$9.1 million in rail revenues, 183,000 tons, and 2,240 carloads of rail paint traffic moving in tank cars. These tank car movements reflect 56%, 60%, and 20%, respectively, of all rail paint revenue, tonnage and carload traffic.¹³ We do not have timely and comparable data for the production of “intermediate” products, which appear to make up most of the tank car paint traffic, and therefore we cannot state how much of this product moves by rail as opposed to truck. CMA's witness Carroll states that shipper investment in rail equipment for bulk movement (tank cars) “effectively ties these shippers to rail service.”¹⁴ Witness Carroll also asserts that “the length of haul of these shipments [those over 300-600 miles] tends to be sufficiently long to preclude trucks as a viable competitive alternative.”¹⁵ The record in this proceeding provides no data either in total or by distance blocks indicating the frequency with which motor carriers transport the types of paints that also move in tank cars.

The record here shows the average R/VC ratio for the bulk movement of paint to be 163%, which falls below the 180% level at which the Board acquires jurisdiction to evaluate whether the traffic is market dominant. But the data also indicate that the R/VC ratio for tank car traffic moving 500 miles or less is 241.1%. This traffic accounts for 15% of the tons and 8% of the revenue for tank car movement of paint. The R/VC ratio for traffic moving between 501 and 1000 miles is 189.9%, which is lower, but is still above the jurisdictional level.

The record therefore shows that a significant segment of paint traffic moves at a ratio of price to cost that suggests that the railroads possess sufficient market power to justify continuing to provide shippers with recourse to challenge the rates charged for the transport of this traffic.

¹³ 1992 Carload Waybill Sample.

¹⁴ V.S. Carroll, pp. 12-13.

¹⁵ V.S. Carroll, p. 13.

Another factor should be taken into account. Since the inception of this proceeding, Congress enacted the ICCTA, which abolished the ICC, established the Board, and eliminated the requirement for the railroads to file tariffs. Inasmuch as no complaints have been filed by paint shippers against the railroads in recent years, the chief burden imposed by regulation was the requirement that tariffs be filed. With that requirement eliminated, the principal obligation imposed on the railroads has been removed. In determining whether to grant an exemption, as in any determination we make, we are influenced by practical considerations. In view of the staleness of the record before us and the fact that the record as made fails to support the case for a total exemption, especially since the removal of regulation of rail transportation of paint appears to offer small benefit to rail carriers post-ICCTA, we will not exempt the rail carriage of paint from regulation under the ICCTA at this time.

ENVIRONMENTAL AND ENERGY CONSIDERATIONS

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

REGULATORY FLEXIBILITY ANALYSIS

This decision will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

It is ordered:

1. This proceeding is discontinued.
2. This decision will become effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary