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SERVICE DATE - MARCH 12, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33331

RESPONDEK RAILROAD CORPORATION--ACQUISITION AND OPERATION
EXEMPTION--EVANSVILLE TERMINAL COMPANY

Decided: March 5, 1997

BACKGROUND

On December 23, 1996, Illinois Southern, Inc. (ISI) filed a verified notice of exemption (verified notice) under 49 CFR 1150.41 from the provisions of 49 U.S.C. 10902 to acquire and operate approximately 17.7 miles of line owned by the Evansville Terminal Company (Evansville): (1) between milepost 227.5 at Poseyville, IN, and milepost 244.7 at Evansville, IN; and (2) between milepost B-204.3 and milepost B-205 at Browns, IL.

By letter dated and filed January 3, 1997, ISI requested that the Board substitute Respondek Railroad Corporation (Respondek), a noncarrier, for ISI in the verified notice. By letter dated January 3, 1997, and filed January 6, 1997, the parties further requested that the Board correct and treat the verified notice of exemption as one under 49 CFR 1150.31 for an exemption from the provisions of 49 U.S.C. 10901.¹

The exemption became effective on December 30, 1996. Notice of the exemption was served on January 10, 1997, and was published on the same date in the Federal Register at 62 FR 1488. The transaction was expected to be consummated on or after the effective date of the exemption. On January 13, 1997, Joseph C. Szabo, for and on behalf of the United Transportation Union-Illinois Legislative Board (UTU), filed a petition to revoke the exemption (Petition). On February 3, 1997, Respondek filed a reply to the petition to revoke (Reply). UTU filed a supplement to its petition to revoke (Supplement) on February 27, 1997.

DISCUSSION AND CONCLUSIONS

UTU's Petition. In its Petition, UTU argues that the verified notice was improperly filed under 49 CFR 1150.31 and thus should be revoked. UTU alleges that Respondek is a rail carrier, performing rail carrier services in Wood River, IL, and, therefore, that it does not qualify for the class exemption at 49 CFR 1150.31. UTU further argues that Respondek must be properly classified as an existing carrier, as Respondek assertedly "impacts upon" rail operations directly affecting UTU-represented personnel.

¹ The verified notice described Respondek as a noncarrier. In addition, the January 3 letter, substituting Respondek for ISI, also described Respondek as a noncarrier and stated that the substitution did not change any other information provided in the verified notice.

Respondek's Reply. In its Reply, Respondek maintains that it has performed services under separate contracts with no more than three industries at Wood River, IL. According to Respondek, those services consisted of switching, entirely on industrial tracks, of cars without any prior or subsequent line-haul transportation performed by Respondek, and those services were not held out to the public at large. Thus, Respondek argues that it has engaged in services as a contract carrier and not as a common carrier as alleged by UTU. Respondent further argues that, because it is not a common carrier, it does not meet the definition of a rail carrier and thus is entitled to use the class exemption provisions of 49 CFR 1150.31.²

UTU's Supplement. In its Supplement, UTU seeks leave (if necessary) to file what is in essence a reply-to-a-reply. We believe that it is necessary to grant leave and will grant that leave in this decision in the interest of having a complete record. In the Supplement, UTU challenges Respondek's claim that it was not a rail carrier prior to the proposed transaction at issue here and that, even if Respondek has, or will, shed its carrier status prior to acquiring the 17.7 miles of trackage from Evansville (as discussed below), if Respondek is affiliated with another rail carrier, Board approval will be required for common control of two rail carriers."

Under 49 U.S.C. 10502(d), "[t]he Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title" The standard for revocation is whether regulation is needed to carry out the rail transportation policy. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. UTU has failed to demonstrate that regulation of Respondek's operations is necessary. There is no substantive basis for revocation of the exemption.

The only real issue, it seems, concerns UTU's assertion that Respondek is a rail carrier and does not qualify for the class exemption at 49 CFR 1150.31. On this point, we have found no record of Respondek ever having been previously authorized by the Interstate Commerce Commission (ICC) or the Board to provide common carrier services, and the described services provided by Respondek at Wood River would not appear to make Respondek a carrier, especially since it is not holding itself out to provide common carrier services.

In any event, Respondek indicated in its Reply that a new corporation, Respondek Corporation, has been formed to replace Respondek as the entity providing contract switching services at Wood River, IL, and that by the time the present transaction is consummated, Respondek will have completely shed itself of all contract switching operations. As a result, even if Respondek's services at Wood River (switching, over industrial trackage) were

² The Reply noted that the proceeding was originally filed inadvertently under 49 CFR 1150.41 but was corrected to come under 49 CFR 1150.31.

deemed to be regulated carrier services, under 49 U.S.C. 10906 Respondek would not have needed ICC or Board approval to begin the operations and would not need Board approval to abandon the operations. Therefore, as long as Respondek has ceased these switching operations prior to consummating its acquisition transaction with Evansville, we find no reason on this record why Respondek should not qualify as a noncarrier able to take advantage of the provisions of 49 CFR 1150.31. UTU is correct, however, that if Respondek Corporation is providing, or will provide, regulated carrier services, and if Respondek Corporation is affiliated with Respondek, the person or entity controlling Respondek Corporation and Respondek requires Board approval or an exemption for the common control. We expect Respondek and its affiliates to comply with the law and seek any necessary authorization for common control.

We note that, moreover, that if Respondek were found to be a carrier, the proposed acquisition and operation would be governed by 49 U.S.C. 10902 and would be eligible for the class exemption at 49 CFR 1150.41. Processing under that statutory provision and those regulations would provide no greater benefit to UTU or UTU-represented personnel. The criteria under 49 U.S.C. 10902 are substantially the same as those found in 49 U.S.C. 10901. The language of the approval criteria in both statutes is identical. Congress has eliminated labor protection altogether from section 10901 transactions and has not given the Board any discretion regarding the imposition of labor protection for acquisitions by Class III under section 10902. See 49 U.S.C. 10902(c) and (d). As labor protection would not have been imposed under section 10901 or 10902, UTU is not affected by the determination as to which applies to this transaction.

Therefore, UTU's Petition to Revoke will be denied.

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

It is ordered:

1. UTU's request for leave to file a reply-to-a-reply is granted, and its supplement to its petition to revoke is accepted.
2. UTU's Petition to Revoke is denied.
3. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary