

BEFORE THE
SURFACE TRANSPORTATION BOARD

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FD 35857

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HOUSATONIC RAILROAD COMPANY, INC.
AND
HOUSATONIC TRACK COMPANY

INTRA-CORPORATE FAMILY TRANSACTION EXEMPTION

MOTION TO DISMISS

EXPEDITED CONSIDERATION REQUESTED

Edward J. Rodriguez
Attorney at Law
8 Davis Road West
P.O. Box 687
Old Lyme, Connecticut 06371
(860) 434-4303

ATTORNEY FOR HOUSATONIC RAILROAD
COMPANY, INC., AND HOUSATONIC TRACK
COMPANY

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Introduction

This pleading concerns a Notice of Exemption filed on Sept. 19, 2014, by Housatonic Railroad Company, Inc. (“HRRC”) and Housatonic Track Company (“Track”),¹ with the Surface Transportation Board (“the Board”) in the above-captioned proceeding for retroactive approval of an intra-corporate family transaction that was consummated in 2000 under Massachusetts law. The transaction involved the merger of HRRC and Track, with HRRC being the surviving corporation.

On October 17, 2014, the Board served a decision directing HRRC to file, by November 6, either an explanation of what precedent Applicants believe indicates that Board approval was required, or a motion to dismiss the notice with an explanation of why Board approval of the transaction was not necessary. As more particularly set forth *infra*, based upon two decisions issued by the Interstate Commerce Commission in 1990 and 1993, HRRC asserts that retroactive

¹ HRRC and Track are sometimes jointly referred to herein as Applicants.

Board authorization for this transaction is unnecessary and it requests that the notice be dismissed for lack of jurisdiction.

At the time of filing of the Notice of Exemption in this proceeding, HRRC was in the process of negotiating a sale of the Massachusetts Line formerly owned by Track to the Commonwealth of Massachusetts, Department of Transportation (“Mass DOT”). The Notice of Exemption was filed at the request of counsel for Mass DOT “out of an abundance of caution” to cure any regulatory defect which might exist as a result of the consummation of the 2000 merger without STB approval or exemption therefrom. Applicants believe that no regulatory filing was required in 1990.

The sale of the line to Mass DOT is proceeding and is the subject of a Notice of Exemption and Motion to Dismiss under docket number FD 35866². Accordingly, Applicants request expedited consideration of this Motion to Dismiss.

Transaction History

At the time of the merger, Track owned the assets of a rail line in Massachusetts³ which was operated by HRRC. The rail line had been acquired by Track from Boston and Maine Railroad in 1991. At the same time, HRRC became the operator of the lines. Both HRRC and Track were wholly owned subsidiaries of Housatonic Transportation Company (“HTC”). In connection with the acquisition HTC, HRRC and Track filed a petition for exemption from the

² Massachusetts department of Transportation – Acquisition Exemption – Certain Assets of Housatonic Railroad Company, Inc., FD 35866 and Motion to Dismiss, FD 35866, both dated October 16, 2014.

³ The rail line is sometimes hereinafter referred to as the Massachusetts Berkshire Line.

common control requirements of 49 UCS 11343.⁴ The ICC found that Track was not and, as a result of that transaction, would not become a carrier for purposes of §11343 and thereby dismissed the petition as unnecessary.⁵ The acquisition by Track and operation by HRRC were authorized by Notices of Exemption under 49 USC 10901.⁶

Argument

49 U.S.C. § 11323, and its predecessor 49 U.S.C. §11343⁷, requires that certain financial

“transactions involving rail carriers providing transportation subject to the jurisdiction of the Board under this part may be carried out only with the approval and authorization of the Board”.⁸

Broadly characterized, the transactions requiring Board approval under §11323 involve transactions in which common control of two or more such rail carriers involved in the transaction exists or will result from the transaction.⁹

The status of HRRC and Track were determined by the ICC in two decisions. At the time that HRRC acquired the operating rights to the Massachusetts Berkshire Line and Track acquired ownership of the property, the Applicants, believing that continuance of control by Housatonic

⁴ Housatonic Railroad Company, Inc. – Operation Exemption – Lines of the Connecticut Department of Transportation and the Housatonic Track Company, Inc. Finance Docket No. 31780.

⁵ Housatonic Railroad Company, Inc. – Operation Exemption – Lines of the Connecticut Department of Transportation and the Housatonic Track Company, Inc. Finance Docket No. 31780, (served December 28, 1990).

⁶ Housatonic Railroad Company, Inc. – Operation Exemption – Lines of the Connecticut Department of Transportation and the Housatonic Track Company, Inc. Finance Docket No. 31780, (served January 2, 1991); Housatonic Track company, Inc. – Acquisition Exemption – Line of the Boston and Maine Corporation, Finance Docket No. 31780 (Sub-No.2), (served January 2, 1991)

⁷ The pertinent provisions of § 11343 were subsequently re-codified pursuant to the ICC Termination Act of 1995 as 49 U.S.C. § 11323.

⁸ 49 U.S.C. § 11323 (a).

⁹ This characterization is admittedly too broad as it does not take account of certain transactions subject to the provisions of the section, such as trackage rights agreements and arrangements. However, as applied to the transactions described herein involving HRRC, it is a fair generalization.

Transportation Company of Housatonic and Track might require an exemption from the ICC under §11343, filed a Petition for Exemption (FD 31780). In a decision issued by David M. Konschnik, then the Director of the Office of Proceedings, the petition was dismissed as unnecessary. The decision stated:

“The Track Company is a Massachusetts corporation which is, or at the time of the consummation of the transaction will be, a subsidiary of HTC. The Track Company, as assignee of an agreement between B&M and the Housatonic Railroad, will purchase the Massachusetts segment of the line and designate Housatonic Railroad as the operator of the line. Since the Track Company will not provide service itself, the common control with Housatonic Railroad does not require Commission approval.” [citation omitted] Finance Docket 31780, (served December 28, 1990) at 4.

The gist of the decision was that Track was not a carrier under the meaning of §11343 (now §11323). A Notice of Exemption permitting the operation of Housatonic (FD 31780) and a Notice of Exemption permitting the acquisition by Track (FD 31780 Sub-No.2) were served on January 2, 1991. This opinion was later referred to by the ICC and will be referred to herein as *Housatonic I*.

While *Housatonic I* may have lacked some clarity as to the actual holding on Track’s status as a carrier, any doubt was removed by a subsequent decision in FD 32163, served October 5, 1993, (*Housatonic II*).

In 1992, Housatonic entities structured a transaction involving the purchase of various lines and rights from Conrail in Connecticut and New York. The opinion describes that transaction in detail but, in summary form as is relevant here, all of the rail operating rights were to be acquired by Danbury Terminal Railroad Company (“DTR”), a new subsidiary of

Housatonic Transportation Company, while the ownership of the real estate was to be acquired by Maybrook Properties, Inc. (“MPI”).¹⁰

Housatonic Transportation Company sought an exemption under from the prior approval requirements of §11343 for its continued control of Housatonic and DTR.¹¹ In a related filing,¹² DTR and MPI sought acquisition and operation exemptions under 49 U.S.C. §10901 in accordance with 49 CFR 1150.31.

In connection with the control issue, the ICC considered not only the status of Housatonic and DTR but also the status of Track and MPI. The Commission stated:

“Track acquired a line segment, but HRC operates it. Similarly, MPI acquired a line segment, but will not operate it. MPI’s line will be operated by DTR. As we now discuss, *we conclude* [emphasis added] that neither Track nor MPI is a carrier within the meaning of the control provisions of section 11343, and therefore HTC’s control of Track and its affiliation with MPI, do not require our approval under section 11343, or exemption from approval.”¹³

Citing *Northwestern Pacific Acquiring Corporation and Eureka Southern Railroad Company, Exemption from 49 U.S.C. 10901 and 11301* (not printed), served Oct. 25, 1984 (*NWP*), *aff’d in relevant part sub nom, RLEA v. ICC*, 784 F.2d 959 (9th Cir. 1986) (*RLEA*), a case in which

¹⁰ Maybrook Properties, Inc. was affiliated with and under common control with Housatonic Transportation Company.

¹¹ Housatonic Transportation Company – Continuance in Control Exemption – Danbury Terminal Railroad Company and Housatonic Railroad Company, Inc. Finance Docket No. 32163.

¹² Danbury Terminal Railroad Company and Maybrook Properties, Inc. – Acquisition and Operation Exemption – Consolidated Rail Corporation, Finance Docket Nos. 32180 and 32180 (Sub-No. 1).

¹³ *Housatonic II* at 7.

“an individual set up two noncarrier subsidiaries to purchase one line of railroad. One subsidiary held title, while the other operated the line. The Commission held ... with the concurrence of the court of appeals (*RLEA*, 784 F.2d at 968-69), that although both subsidiaries required section 10901 authority to acquire and operate the line, the nonoperating subsidiary was *not* a carrier for section 11343 purposes. The Commission explained ... that the noncarrier acquiring subsidiary “will not actually provide railroad transportation for compensation.” The court agreed (*RLEA* 784 F.2d at 968) that the acquiring entity was not a carrier providing transportation”¹⁴

After using that precedent to affirm *Housatonic I*, the Commission concluded “neither Track nor MPI is a carrier for purposes of the control provisions of section 11343....As neither Track nor MPI provides service, neither is a carrier within the meaning of section 11343 requiring common control approval.” The Commission went on to explain that its resolution is consistent with the intent of section 11343.¹⁵

The decisions as to the parties involved were final and have not been appealed or reopened. No changes occurred with respect to Track between the date of these two decisions and the date of the merger which would have changed the status of Track for purposes of applying §11343 (or its successor §11323). The decisions in *Housatonic I* and *Housatonic II* are controlling and it was unnecessary for Housatonic and Track to file a proceeding under §11343 with respect to the merger. Accordingly, the pending Notice of Exemption relating to that merger is unnecessary and should be dismissed.

Conclusion

For the foregoing reasons, Housatonic Railroad Company, Inc. respectfully requests that the Board dismiss Housatonic Railroad Company’s and Housatonic Track Company’s Notice of Exemption in this proceeding as not involving a transaction requiring Board approval or

¹⁴ *Id.*

¹⁵ *Housatonic II* at 8.

exemption therefrom under 49 U.S.C. 11323, and that the Board expedite its consideration so as not to delay the pending sale of the Massachusetts Berkshire Line to the Massachusetts Department of Transportation.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Edward J. Rodriguez". The signature is fluid and cursive, with a long horizontal stroke at the end.

Edward J. Rodriguez
Attorney at Law
8 Davis Road West
P.O. Box 687
Old Lyme, Connecticut 06371
(860) 434-4303

ATTORNEY FOR HOUSATONIC RAILROAD
COMPANY, INC., AND HOUSATONIC TRACK
COMPANY

Dated November 3, 2014