

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

233026

**FD 35648**

ENTERED  
Office of Proceedings  
September 24, 2012  
Part of  
Public Record

**PENN-OHIO TRANSPORTATION, LLC  
EXEMPTION FOR PURCHASE OF LEASE,  
ASSIGNMENTS OF OPERATING RIGHTS AND ACQUISITION OF  
LEASED LINE-EASTERN STATES RAILROAD, LLC AND  
COLUMBIANA COUNTY PORT AUTHORITY**

**COLUMBIANA COUNTY PORT AUTHORITY  
PETITION TO REVOKE EXEMPTION  
AND RELATED RELIEF**

**YOUNGSTOWN & SOUTHEASTERN RAILWAY COMPANY'S  
STATEMENT IN SUPPORT**

Respectfully submitted,

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Dated: September 24, 2012

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**I.  
INTRODUCTION**

On July 13, 2012, an entity calling itself Penn-Ohio Transportation, LLC, (“Penn-Ohio”) filed a verified Notice of Exemption with the Surface Transportation Board (“the Board”) to acquire and operate a line of railroad currently owned by the Columbiana County Port Authority (“CCPA”) and leased to Eastern States Railroad, LLC (“ESRR”). Approximately, two months later

CCPA filed a Petition to Revoke Penn-Ohio's notice. Youngstown & Southeastern Railway Company ("YSRR"), a class III short line railroad licensed by the Board to sublease and operate the subject track from ESRR,<sup>1</sup> files this Statement in Support of CCPA's Petition. YSRR endorses as its own the comments submitted by CCPA. Additionally, YSRR urges the Board to revoke Penn-Ohio's notice because (1) it contains false and misleading information, (2) Penn-Ohio has no agreement covering its acquisition of the subject line, (3) this dispute is a controversial matter not appropriate for handling by an expedited exemption, and (4) the fact that Penn-Ohio's corporate parent is engaged in the transportation of solid waste raises substantial public interest questions requiring further Board consideration.

## II.

### STATEMENT OF FACTS

This proceeding involves a line of railroad ("the Line"),<sup>2</sup> extending between milepost 0.0 at Youngstown and milepost 35.7 in Darlington, PA, which has had a long, complicated, and contentious history at the Board. Originally owned by the Youngstown & Southern Railroad, a short line railroad subsidiary of the now defunct Pittsburgh & Lake Erie Railway, the Line was acquired – unlawfully at

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<sup>1</sup> Youngstown & Southeastern Railway Company–Lease and Operation Exemption–Lines of Eastern States Railroad, LLC, FD 34962, STB served Dec. 21, 2006.

<sup>2</sup> The Line also includes various trackage, operating, easement, land lease, and interchange rights ("the Rights") identified in detail in CCPA's Petition at page 2.

first – by Rail Ventures, Inc. (“RVI”). After intervention by the Board, RVI was forced to obtain Board acquisition authority. Subsequently, it sought to abandon the Line and CCPA acquired it through the offer of financial assistance provisions of the ICC Termination Act’s abandonment statute. CCPA initially contracted for operations with a short line railroad that entered bankruptcy. Eventually, ESRR leased the Line from CCPA with an option to acquire and entered into an agreement in 2006 with YSRR to sublease and operate the Line.

Although YSRR is going to defer to CCPA’s more thorough explanation of the facts, the gist of this dispute is that Penn-Ohio’s owner Tervita, LLC, a major player in the solid waste business, had originally agreed to purchase the entire 35.7 miles of railroad constituting the Line as well as the Rights that CCPA has identified in its Petition. Moreover, the unsigned agreement between CCPA and Penn-Ohio provided that unless closing occurred by August 8, it would be in default. But Penn-Ohio did not submit its filing until July 13, so there was no way it could legally close by the agreed upon date. On August 3, Penn-Ohio advised CCPA that it had decided not to consummate the transaction with CCPA.

YSRR believes that Tervita and Penn-Ohio may be using this notice to facilitate the acquisition of just those three miles of track constituting the Rights, thereby giving it access to both CSX Transportation and Norfolk Southern Railway without acquiring the rest of the railroad. Acquiring the Rights without the rest of

the Line is tantamount to skimming the cream but leaving the milk to sour. It *devalues* CCPA's property rights including CCPA's ability to sell these assets to a responsible buyer, which in turn potentially adversely impacts YSRR. To the extent Penn-Ohio's filing does not disclose its true intentions, it is *materially misleading* and should be revoked.

As the only current operator on the Line, YSRR has a legitimate interest in the outcome of and standing to participate in this proceeding. While Penn-Ohio's notice discloses the fact that YSRR is the current operator on the Line and that it "intends to continue operations with the current operator or lease the Line to an operator who will file the appropriate Notice of Exemption at the Board and become a common carrier on the Line,"<sup>3</sup> that statement is meaningless now that Penn-Ohio has decided not to acquire the Line.

### III. ARGUMENT

As a general matter, the Board will authorize a railroad transaction by means of an exemption under 49 U.S.C. § 10502(d), where (1) regulation is unnecessary to carry out the rail transportation policy articulated in § 10101 of the ICCTA and (2) where the transaction is either of limited scope or there is no opportunity for abuse of captive shippers. Where, as here, an exemption has become effective, a

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<sup>3</sup> See, statement on page 4 of the Notice.

revocation request is treated as a petition to reopen and revoke, and, under 49 C.F.R. § 1115.3(b), it must state in detail whether revocation is supported by material error, new evidence, or substantially changed circumstances. *See, New York Cent. Lines—Aban. Exemption—in Montgomery & Schenectady Cntys., AB 565 (Sub-No. 14X), STB served Jan. 22, 2004.* The fact that Penn-Ohio no longer has a valid contract to acquire the Line is just such a change in circumstances or new evidence warranting a reopening.

Where an exemption contains false or misleading information, that exemption is void *ab initio* and will be revoked. *See, 49 C.F.R. § 1150.32 and San Francisco Bay Railroad-Mare Island—Operation Exemption—California Northern Railroad, FD 35304, STB served December 6, 2010.* Failure to disclose material information can render a notice misleading by omission, and therefore void *ab initio*. *See U S Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC, FD 35042, slip op. at 3-4, STB served Oct. 8, 2008.* “Material” means the transaction would not have otherwise qualified for an exemption. *Berkshire Scenic Ry. Museum, Inc. v. ICC, 52 F.3d 378 (1st Cir. 1995).* A misrepresentation by the applicant as to the lack of an agreement covering the acquisition and/or operation of a rail line has been found by the Board to constitute a material misrepresentation rendering the exemption void and serving as the basis for revocation. *San Francisco Bay Railroad, supra.* As recently as September 21,

2012, the Board reiterated that it will view as false and misleading an incorrect representation as to the status (or lack thereof) of an agreement giving a railroad applicant any right to purchase or access a line and will reject any notice of exemption containing such a representation. Utah Southern Railroad Company, LLC-Change in Operators Exemption-Iron Bull Railroad Company, LLC, FD 35558, STB served Sept. 21, 2012.

Penn-Ohio's transaction fits just that pattern. From what YSRR can determine, Penn-Ohio did at one time have an understanding with CCPA to acquire the Line including both the operating and leasehold rights possessed by ESRR and the physical assets owned by CCPA. But it chose not to proceed with that transaction for reasons of its own choosing. Accordingly, no agreement with CCPA exists today and there is no basis for this transaction. While Penn-Ohio might have negotiated a new agreement with ESRR to acquire certain limited rights from it, such an agreement would contravene and jeopardize CCPA's ownership rights in the Line. Furthermore, Penn-Ohio's notice does not properly identify that new transaction, whatever it is.

Moreover, the Board has in the past ruled that the class exemption process is not appropriate for controversial cases in which a more detailed record is required than is produced through a notice of class exemption. Riverview Trenton Railroad Company — Acquisition and Operation Exemption — Crown Enterprises, Inc., FD

33980, STB served Feb. 15, 2002. Regardless of whether Penn-Ohio even has an agreement allowing it to acquire the Line or any portion thereof, the fact that Penn-Ohio's owner, Tervita, is engaged in the waste business raises significant public interest questions that require more than the superficial review provided under the exemption procedures. ABC & D Recycling, Inc.-Lease and Operation Exemption-A Line of Railroad In Ware, MA, Docket No. FD 35397, STB served Jan. 20, 2011. In Solid Waste Rail Transfer Facilities, Docket EP-684, STB served March 24, 2011, the Board issued "revised interim rules" governing the establishment of waste transfer facilities and the movement of solid waste by rail. Penn-Ohio's notice fails to disclose the nature of its relationship with Tervita or applicant's intentions regarding the use of the Line. However, the prospect that it might be used in connection with the movement of solid waste and the fact that the Board now regulates this form of transportation warrants a more thorough review than the exemption process allows.

#### IV. CONCLUSION

The simple fact is that Penn-Ohio's notice raises more questions than it answers. Accordingly, YSRR joins CCPA in asking the Board to find its notice void *ab initio* and to revoke it. Additionally, YSRR joins in CCPA's request that the Board void any agreement whereby ESRR or its owner could transfer any

rights that ESRR still possesses to Tervita or Penn-Ohio in violation of ESRR's agreement with CCPA.

Respectfully submitted,



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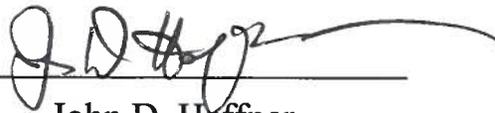
CERTIFICATE OF SERVICE

I, John D. Heffner, do hereby certify that a copy of the foregoing Statement In Support was served via email and first-class U.S. mail this 24<sup>th</sup> day of September, 2012, on the following named individuals:

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