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DEC 6 2004

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December 6, 2004

BY HAND DELIVERY

ENTERED
Office of Proceedings

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001

DEC 06 2004

Part of
Public Record

Re: Finance Docket No. 34540, The Columbus & Ohio River
Rail Road Company – Acquisition and Operation Exemption
– Rail Lines of CSX Transportation, Inc. from Columbus to
Newark, Ohio and from Mt. Vernon to Cambridge, Ohio

Dear Secretary Williams:

Enclosed for filing in the referenced docket please find an original and ten copies of the Reply of The Columbus & Ohio River Rail Road Company to UTU's Motion to Compel.

An additional copy of the Reply also is enclosed. Kindly indicate receipt of the filing by time-stamping this extra copy and returning it to the bearer of this letter. Thank you for your consideration in this matter.

Sincerely,

Andrew B. Kolesar III
An Attorney for The Columbus & Ohio
River Rail Road Company

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

DEC 6 2004
RECEIVED

THE COLUMBUS & OHIO RIVER RAIL)
ROAD COMPANY – ACQUISITION AND)
OPERATION EXEMPTION – RAIL LINES)
OF CSX TRANSPORTATION, INC. FROM) Finance Docket No. 34540
COLUMBUS TO NEWARK, OHIO)
AND FROM MT. VERNON TO)
CAMBRIDGE, OHIO)

REPLY TO UTU'S MOTION TO COMPEL

THE COLUMBUS & OHIO RIVER
RAIL ROAD COMPANY
47849 Papermill Road
Coshocton, Ohio 43812

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Dated: December 6, 2004

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Attorneys & Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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THE COLUMBUS & OHIO RIVER RAIL)
ROAD COMPANY – ACQUISITION AND)
OPERATION EXEMPTION – RAIL LINES)
OF CSX TRANSPORTATION, INC. FROM)
COLUMBUS TO NEWARK, OHIO)
AND FROM MT. VERNON TO)
CAMBRIDGE, OHIO)

Finance Docket No. 34540

REPLY TO UTU’S MOTION TO COMPEL

On November 16, 2004, the United Transportation Union (“UTU”) filed a Motion to Compel The Columbus & Ohio River Rail Road Company (“CUOH”) to produce documents in response to UTU’s October 21, 2004 discovery requests. CUOH hereby replies in opposition to UTU’s Motion and respectfully submits that the Board should find that UTU has waived its right to seek discovery from CUOH.¹

SUMMARY

UTU’s Motion to Compel minimizes and/or neglects to address a number of key details regarding the history of this case that bear upon the issue of whether UTU’s effort to seek discovery is procedurally defective. That history includes: (i) UTU’s

¹ In addition to waiving its right to file discovery requests, UTU also has delayed significantly in the filing of its Motion to Compel. In particular, CUOH first indicated that it would not respond to UTU’s October 21, 2004 discovery requests in its October 28, 2004 “Reply to UTU’s Third Petition to Revoke.” *Id.* at 6-7. UTU did not file its Motion to Compel until November 16, 2004, which constitutes a delay of nineteen (19) days.

decision to oppose CUOH's exemption through two filings that UTU made in a different docket rather than the instant docket (notwithstanding the fact that UTU was fully aware of the proper docket number for CUOH's exemption notice); (ii) UTU's failure to serve its first two Petitions to Revoke upon CUOH until more than two weeks after making its initial filing with the Board; and most importantly, (iii) UTU's failure to serve discovery upon CUOH in conjunction with either of its first two misfiled and delinquently served Petitions to Revoke.

As such, this is not simply a case of UTU serving its discovery requests upon CUOH "a few days late." Cf. Finance Docket No. 34536, Indiana & Ohio Central R.R. – Acquisition and Operation Exemption – CSX Transp., Inc. (STB served Nov. 23, 2004) ("IOCR"). On the contrary, UTU's opposition to the CUOH exemption reflects a pattern of significant disregard for the Board's procedural requirements. Ironically, as discussed infra, UTU attempts through its Motion to Compel to use its own procedural irregularities as a justification in support of its Motion (i.e., UTU claims that since its first two efforts to oppose the CUOH exemption were filed before – or, in the case of UTU's Amended Petition, immediately after – the actual filing of CUOH's Notice, they somehow should not be held against UTU when applying the Board's waiver regulation). The Board should not permit such a result.

BACKGROUND

UTU filed its first Petition to Revoke on September 15, 2004 in Finance Docket No. 34536, Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption – CSX Transportation, Inc. (Notice filed September 1, 2004) (“First Petition”). Although UTU filed this First Petition only in Finance Docket No. 34536, UTU nevertheless sought rejection of CUOH’s exemption in the instant docket. Specifically, UTU argued in its First Petition that:

. . . [i]n addition to the continuing exemptions that the agency can expect from CSXT in the coming months, there is currently before it a similar notice in Finance Docket No. 34540, *Columbus Ohio River Railroad – Acquisition Exemption – Lines of CSXT between Columbus and Cambridge, Ohio*, a line between Newark and Mt. Vernon, Ohio, a distance of approximately 114 miles of CSXT’s main lines in central Ohio. . . .

. . . UTU submits that the Notice of Exemption in Finance Docket No. 34536 and the Notice of Intent in Finance Docket No. 34540 be rejected

See UTU’s First Petition at 2-3.

On September 24, 2004, UTU filed an Amended Petition to Revoke in Finance Docket No. 34536 (“Amended Petition”), adding a request for discovery from the Indiana & Ohio Central Railroad (“IOCR”) to its prior Petition, but otherwise including the same text as its First Petition. Once again, UTU’s Amended Petition sought rejection of the exemptions in both Finance Docket No. 34536 and the instant docket. See UTU’s

Amended Petition at 3 (“UTU submits that the Notice of Exemption in Finance Docket No. 34536 and the Notice of Intent in Finance Docket No. 34540 be rejected . . .”).

On October 5, 2004, UTU filed a letter with the Board in the instant proceeding (i.e., Finance Docket No. 34540) indicating that on September 30, 2004, it had mailed copies of its First Petition to Revoke and its Amended Petition to Revoke to CUOH. It appears from UTU’s correspondence that service upon CUOH was made only as a result of a communication from the Board’s Staff. See UTU’s September 30, 2004 Letter to the Board (filed October 5, 2004) (indicating that service upon CUOH was made “[p]ursuant to your conversation with a member of [UTU’s] staff this morning . . .”).

Notwithstanding the procedural irregularities associated with the UTU filings, out of an abundance of caution, CUOH filed a reply to UTU’s First Petition and its Amended Petition on October 19, 2004. CUOH filed that reply in the instant Finance Docket.

Three days later (i.e., October 22, 2004), without any mention of the fact that it already addressed the CUOH exemption in its Petition and its Amended Petition, UTU filed an additional Petition to Revoke regarding CUOH’s exemption. Notably, this Third UTU Petition was the first to be filed in Finance Docket No. 34540. UTU served

its requests for discovery upon CUOH in conjunction with the Third Petition. It is these requests that are the subject of UTU's Motion to Compel.²

ARGUMENT

The Board's regulations indicate that "[i]n petitions to revoke an exemption, a party must indicate in the petition whether it is seeking discovery" and that "[i]f it is, the party must file its discovery requests at the same time it files its petition to revoke." See 49 C.F.R. § 1121.2 (emphasis added). Consistent with those regulations, the Board has explained that in the context of seeking revocation of an exemption, "if petitioner does not file discovery requests when it files its petition to revoke, it will have waived its right to discovery. . . ." See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, 1 S.T.B. 754, 772 (1996) (emphasis added).

UTU's service of discovery upon CUOH first took place by letter dated October 21, 2004. That letter was dated more than five full weeks (i.e., 37 days) after UTU first opposed the CUOH exemption. As such, by waiting until the submission of its Third Petition to Revoke before serving discovery requests upon CUOH, UTU has "waived its right to discovery." Id.

² On October 22, 2004, CUOH filed a pleading with the Board regarding minor changes in the end points of the lines to be acquired from CSX Transportation, Inc.

In its November 16, 2004 Motion to Compel, UTU attempts to utilize its own procedural missteps as excuses to justify its delay in seeking discovery from CUOH. In particular, UTU contends that it cannot be faulted for waiting until the filing of its Third Petition to Revoke to seek discovery because both its first and second Petitions to Revoke were filed before the CUOH Notice of Exemption (or at least before UTU was aware that CUOH's Notice of Exemption had been filed):

[I]t is clear that CUOH's argument [regarding the waiver of discovery] is completely unfounded since no Notice of Exemption had been filed for UTU to revoke or serve a discovery request regarding at the time of UTU's [September 15, 2004 Petition to Revoke and its September 23, 2004 Amended Petition to Revoke].

See Motion to Compel at 3.

UTU cannot excuse itself from compliance with the Board's regulations regarding discovery merely by acknowledging that its first two Petitions to Revoke were premature (in addition to having been filed in the wrong docket – notwithstanding the fact that UTU's first two Petitions to Revoke each made internal reference to the correct CUOH docket number). CUOH is not the party responsible for UTU's decision to oppose the CUOH exemption prior to the actual filing of CUOH's Notice (through filings made in a separate docket). Sole responsibility for that decision rests with UTU. If UTU did not believe that it was proper to oppose CUOH's exemption prior to the actual date of its filing, then UTU should have refrained from addressing the matter in its First Petition and its Amended Petition.

UTU's Motion to Compel also suggests that parties are free to file a second Petition to Revoke in the same proceeding where "information hidden by a party could surface at a later date" See Motion to Compel at 3. CUOH respectfully submits that UTU's observation has nothing to do with the facts of the instant proceeding. Here, contrary to the hypothetical that forms the basis of UTU's argument, UTU's Third Petition to Revoke does not add any new information to its first two Petitions. There is no suggestion from UTU that it has obtained new information that justified the filing of its Third Petition and warranted the service of discovery requests.

Finally, CUOH notes that in its Motion to Compel, UTU accuses CUOH of being "secretive and uncooperative." See Motion to Compel at 3. It should be remembered, however, that it was UTU that elected to oppose CUOH's exemption through a separate STB docket without serving its petition on CUOH for more than two weeks. This UTU approach has forced CUOH to expend considerable effort to address unsupported claims made on repeated occasions in multiple proceedings. Having been placed in such a position by UTU's actions, CUOH respectfully submits that its refusal to volunteer the production of documents does not constitute "secretive and uncooperative" behavior.⁵

³ UTU's discovery requests also implicate confidentiality concerns. As such, CUOH hereby reserves its right to seek a protective order limiting the use and disclosure of any documents ordered to be produced in response to UTU's motion.

CONCLUSION

For the foregoing reasons, CUOH respectfully requests that the Board deny
UTU's Motion to Compel.

Respectfully submitted,

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RAIL ROAD COMPANY
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Dated: December 6, 2004

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Certificate of Service

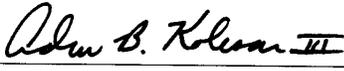
I hereby certify that this 6th day of December, 2004, I have caused a copy of the foregoing Reply to be served via first-class mail, postage prepaid, upon the following individuals:

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