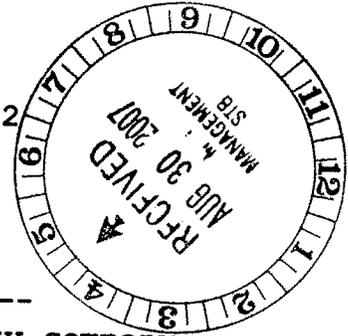


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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35042



U S RAIL CORPORATION
-- LEASE AND OPERATION EXEMPTION --
SHANNON G., a New Jersey limited liability company

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 U.S.C. 10902 and 49 CFR 1150.41

REPLY OF U S RAIL CORPORATION TO PETITION TO INTERVENE OF
THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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Due: August 30, 2007

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Office of Proceedings

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Public Record

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INTRODUCTION

U S Rail Corporation ("U S Rail") replies to the pleading submitted by the New Jersey Department of Environmental Protection ("DEP"), entitled "Petition for Leave to Intervene and Reply to Supplemental Information" and filed with the Board on August 10, 2007.

In substance if not in form, DEP's pleading constitutes a Petition to Reject or Revoke, and, for the reasons discussed below, should be denied for failure to meet the burden of proof required by 49 U.S.C. 10502.

BACKGROUND

Briefly summarizing the procedural history of this matter, U S Rail, an existing class III short line rail carrier with operations in central Ohio, originally filed a Verified Notice of Exemption under 49 CFR 1151.41 on June 6, 2007 to lease and operate a 1,400 foot private siding under construction in Paterson, NJ. Shannon G ("SG"), a New Jersey-based real estate developer, was building the track that is the subject of this proceeding on its land as a private siding to serve a transload facility it was developing. U S Rail represented in its Verified Notice of Exemption that it had executed a Railroad Operating and Property Lease Agreement with SG for the common carrier lease and operation of the subject trackage and transload terminal that SG is currently constructing as a private railroad outside the regulatory jurisdiction of the Board, and that it [U S Rail] would hold itself out as the exclusive provider of common carrier rail freight service at that facility.

By decision served June 15, 2007, the Board stayed U S Rail's exemption until further notice and requested supplemental information describing, in detail, why SG's track qualifies as a private line of railroad. U S Rail submitted that information on July 3, 2007.

Initially, only one party, the City of Paterson, NJ, protested U S Rail's exemption notice.¹ The City filed a "Notice of Intent to Participate and Certification of Service" on June 26, 2007, followed by its "Opposition Statement" on July 26, 2007. U S Rail filed its reply to the City's opposition on August 17, 2007.

On August 10, 2007, the DEP petitioned the Board to intervene and reply to the Board's request for supplemental information. U S Rail now submits this reply to the DEP's Petition.

LEGAL ARGUMENT

PART I

The Board should recognize the DEP's Petition for what it is, namely a garden variety Petition to Reject or Revoke U S Rail's exemption, and subject the DEP's challenge to the rigorous test of 49 U.S.C. 10502. Only tangentially or even perhaps coincidentally is the Petition in the nature of a reply to the Supplemental Information that U S Rail filed on July 3, 2007 regarding the status of SG's track as "private track."

¹ The New York Susquehanna & Western Railway Company ("NYS&W") filed a letter containing its comments, but did not actually oppose the transaction.

Under 49 U.S.C. 10502, the Board may revoke an exemption if regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that revocation of the exemption is warranted. See, Minnesota Comm. Ry., Inc.-Trackage Exempt.-BN RR.CO., 8 I.C.C.2d 31, 35 (1991). There the ICC stated that it would revoke an exemption where regulation under a specific statutory section was justified. Moreover, the ICC noted that Congress, in enacting the predecessor of Section 10502 determined that exemptions should be granted liberally and it would rely on "after the fact" remedies including revocation to correct any abuses of market power. See, STB Ex parte Docket No. 392 (Sub. No. 1) -- Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C. 2d 810, 811 (1985), aff'd sub nom. Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987); Bulkmatic Railroad Corporation--Acquisition and Operation Exemption--Bulkmatic Transport Company, STB Finance Docket No. 34145, (served Nov. 19, 2002) and cases cited therein.

The DEP contends that U S Rail's exemption is "controversial". For the reasons discussed extensively in

Part II, subsection 3 below, there is nothing inherently controversial about the practice of converting a private industrial track into a common carrier line of railroad, inasmuch as such transactions are routine. See, e.g., SMS Rail Service, Inc.--Petition For Declaratory Order, STB Finance Docket No. 34883 (served Jan. 24, 2005); Yolo Shortline Railroad Company--Lease And Operation Exemption--Port Of Sacramento, STB Finance Docket No. 34114 (served Feb. 3, 2003); and Hainesport Industrial Railroad, LLC--Acquisition and Operation Exemption--Hainesport Industrial Park Railroad Association, Inc., STB Finance Docket No.34695 (served May 18, 2005).

In several of these cases the Board upheld the use of the exemption process in the face of substantial opposition. Moreover, exemptions are not limited to service continuation but also encompass including new service or reinstatement of service. The statute (49 U.S.C. 10901 and 10902) and regulations promulgated thereunder do not differentiate between new and continued operations.

Under the applicable exemption provisions of 49 U.S.C. 10502 the Board shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part-

(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 DEP has submitted neither legal authority nor credible evidence tending to show that U S Rail's exemption fails to carry out a single one of the 15 enumerated goals of the rail transportation policy of 49 U.S.C. 10101, and either that the transaction is not limited in scope or presents an opportunity for abuse of a captive shipper. On the contrary, SG, the proposed shipper, fully supports this transaction.

Without citing any evidence that its concerns are reasonable and specific, DEP speculates that U S Rail *may* be using the Notice of Exemption to shield itself from regulation of "what are *likely* to be" solid and/or hazardous waste activities. (Emphasis supplied.) In so speculating, the DEP places the proverbial cart before the horse. U S Rail's application merely seeks Board approval to convert SG's private track into a common carrier a line

of railroad, an activity expressly within the Board's jurisdiction.

PART II

In support of its request to have the Board require U S Rail to resubmit its transaction for approval by formal application, DEP asserts six somewhat disjointed and highly speculative grounds for revocation. Addressing them *seriatim*, U S Rail replies as follows.

1. No solid waste traffic will be handled at this facility. Responding to the hue and cry the DEP raises over the supposed mix of commodities to be handled at this facility, U S Rail reiterates that it has no plans to handle either solid waste or construction/demolition debris at the proposed facility. Nor has U S Rail been involved in the business of hauling solid waste materials since April 2006. See August 30, 2007 Verified Statement of Gabriel Hall, annexed hereto as Exhibit A.

2. Eminent Domain. It is undisputed that U S Rail's development plans predate the City initiating eminent domain proceedings to condemn SG's property. Intervener wrongly implies that the filing of an eminent domain condemnation proceeding in May 2007 prompted U S Rail and SG to concoct this application for the purpose of either

forestalling condemnation or else substantially inflating the value of SG's parcel of land. The evidence is otherwise. The lease agreement was executed by U S Rail and SG on August 10, 2006, more than six months before the City tendered its purchase offer to SG on February 12, 2007, attached to Paterson's Opposition Statement at Appendix 4. See also the July 3 and Aug. 17, 2007 verified statements of Gabriel Hall of U S Rail, which set forth in considerable detail the July 2006 genesis of this project, attached to U S Rail's July 3, 2007 Supplemental Information in Support of Petition.

3. Character of the track as private track. As a general matter, the Board has consistently held that "it has no jurisdiction over private track - track that is used exclusively by the track's owner for movement of its own goods (either by utilizing its own equipment or by contracting for service) and for which there is no common carrier obligation to serve other shippers that might locate along the line." B. Willis, CPA, Inc.-Petition for Declaratory Order, STB Finance Docket No. 34013 (served July 26, 2002). In finding the track private, the Board reasoned that "a person is not a rail carrier for the purposes of the ICA unless it holds itself out to provide rail service to others." The Board also said that where a

shipper does not hold out to provide common carrier rail service over the line it constructs and maintains to serve its own facility and no other shippers are served by the line, then neither the construction, nor a railroad's operation over that track to reach the shipper's facility, requires ICC or Board authorization or approval.

U S Rail recognizes that there is a recent trend involving the common carrier conversion of private rail lines. See, e.g., SMS Rail Service, Inc. - Petition for Declaratory Order, STB Finance Docket No. 34483, served Jan. 24, 2005, citing SMS Rail Service, Inc. - Lease and Operation Exemption - Pureland Association, Inc., Finance Docket No. 32494 (ICC served May 26, 1994); Penn-Jersey Rail Lines - Acquisition and Operation Exemption - Lines in Penn Warner Industrial Park, Falls Township, Bucks County, PA, STB Finance Docket No. 33835 (served May 5, 2000); and SMS Rail Service, Inc. - Acquisition and Operation Exemption - Valero Refining Company-New Jersey, STB Finance Docket No. 33927 (served Sept. 22, 2000); Yolo, supra. slip op. at 4 n.9; Union Pacific Railroad Company - Operation Exemption - In Yolo County, CA, STB Finance Docket No. 34252 (served Dec. 5, 2002); and Ohio Valley Railroad Company - Acquisition and Operation Exemption - Harwood

Properties, Inc., STB Finance Docket No. 34486 (served Feb. 23, 2005).

U S Rail knows of no Board or ICC decision that would preclude it from initiating common carrier operations over a new piece of private track once construction is finished. In any event, DEP makes too much of the fact that SG's track is not fully constructed. Had it been fully constructed and connected to the national rail system there would be no question as to U S Rail's ability to lease and operate this line as a common carrier.

In its July 3, 2007 response to the Board's inquiry U S Rail submitted two verified statements. The first statement furnished by SG's John Lira shows how the subject track qualifies as private track under traditional precedent. SG's track was built on SG property at its expense. Had U S Rail not expressed a desire to use this track to perform common carrier rail service over it, SG would have employed U S Rail to operate it as its contractor. SG would be the only rail shipper at that location and would be the sole shipper shown in the bill of lading.² See John Lira V.S. at p. 3. As Mr. Lira explains

² Parties for whom SG would be providing transloading services on its private track would be its customers rather than those of the serving railroad.

in his statement, SG acquired the land on which the track has been built as an investment. It found that this property made a good site for handling stone traffic. Subsequently, it found that the property would be a useful site for transloading other commodities which it bought and sold. To that extent, SG needed a rail siding and rail service in its multiple roles as a rail customer, a consignee and a consignor of freight. Id. at pp. 1-3.

U S Rail also submitted verified statements prepared by its president Gabriel Hall describing its business plan of using a network of short track segments in urban areas of the East to help its Ohio railroad to attract freight that would otherwise move by truck. Mr. Hall explains how he came upon this opportunity, how U S Rail's proposed operation evolved from merely operating the trackage as a contractor for SG into a common carrier operation, and the status of his negotiations with NYS&W to reach an agreement for switch installation and traffic interchange. See Hall July 3, 2007 V.S. at pp. 1-3.

Significantly, NYS&W has stated that should U S Rail obtain Board authority to operate and construct the subject rail facilities, NYS&W would be prepared to negotiate appropriate arrangements to permit service to the facility described U S Rail's exemption. The Board has consistently

ruled that its authority need not await the execution of an interchange agreement for the provision of rail service. See, e.g., New England Transrail, LLC, D/B/A Wilmington & Woburn Terminal Railway--Construction, Acquisition and Operation Exemption--In Wilmington and Woburn, MA, STB Finance Docket No. 34797 (served July 10, 2007). ("New England Transrail").

4. Track usage. DEP contends that the authorized use of the site for rail operations lapsed at some undisclosed point in time after 1967, and that the property's character somehow devolved into non-rail usage. This contention is utterly without merit. It is undisputed that the site itself was used as a rail served lumber yard from the 1930s to the late 1960s. There is no evidence that the property was ever used for non-rail purposes (rail use being ancillary to primary use of the property as a lumber yard).

NYS&W tracks parallel the property line, rendering its character uniquely suited to SG's proposed use. Rail operations have been conducted on this line for many decades, long predating the City's use of the adjoining property as a public works facility, or the construction of the senior citizen residence to which the City refers in its opposition.

Consistent with 49 U.S.C. 10902, U S Rail seeks to restore rail service to SG's property. As was the situation in New England Transrail, *supra*, all of U S Rail's contemplated uses of the property, namely loading, unloading and transloading, constitute rail transportation under the I.C.C. Termination Act of 1995, Pub. L. 104-88.

The proposed transaction will help promote a safe and efficient rail transportation system, foster economic redevelopment of a blighted urban area and encourage efficient management of resources by adding freight traffic to the currently underutilized NYS&W line. The Board has granted exemptions in similar situations. Cf., Texas Mexican Railway Company--Purchase Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33914 (served Dec. 11, 2000), involving the restoration of service on an out-of-service line.

5. The transaction as a "bona fide" rail venture. Intervener goes so far as to assert without support or explanation that applicant is misusing the exemption process as a "device to acquire or retain property for non-rail purposes using federal preemption as a shield." Applicant is perplexed by the assertion that it does not intend to use the property for rail purposes, particularly in light of U S Rail's lease from SG, which clearly and

unambiguously specifies such use. See DEP Exhibit A. Intervener offers not a single fact in support of this nonsensical assertion, which the Board should accordingly disregard.

In attempting to cast doubt upon the legitimacy of the enterprise the DEP portrays SG's anticipated financial return on its investment as nominal. In so doing, the DEP overlooks or else chooses to ignore the plain terms of the lease pursuant to which SG stands to realize a \$50 premium per car load which will become due and owing as additional rent beginning January 1, 2012. This additional rent, under lease paragraph 3(c), has the potential for generating an estimated \$95,000 to \$120,000 additional revenue to SG from U S Rail handling 1900-2400 annual car loads (see U S Rail's July 13, 2007 response to the Attorney General's June 12, 2007 letter, annexed to the DEP's petition as Exhibit D.) This additional revenue has the potential for more than doubling SG's return on its investment from \$100,000 to \$220,000 per annum. Such sums are proof positive that the parties to the lease envision a mutually profitable long term business relationship.

6. STB environmental regulation. The threshold for STB environmental regulation of this project has not been met. Like the City of Paterson, DEP would have the Board

believe that U S Rail's exemption requires environmental review as to both air and noise pollution.

The pertinent regulation is 49 CFR 1105.7 which gives the Board the ability to regulate and impose environmental conditions on rail transactions involving air pollution in nonattainment areas such as northern New Jersey. Under that regulation the Board can review for environmental compliance and impose appropriate relief where the proposed action will result in either an increase in rail traffic of at least 50% or an increase of at least three trains per day (round trips) on any segment of rail line, an increase in rail yard activity of at least 20% in carloads, or an average increase in truck traffic of more than 10% of the average daily traffic or 50 vehicles per day on a given road segment. Should this transaction be regarded as analogous to either rail construction or the reinstatement of service over a previously abandoned line, the Board environmental regulation is only implicated where the amount of traffic to be handled results in the operation of at least three trains per day. 49 CFR 1105.7(d)(5)(ii). Moreover, Board environmental regulation over noise is not triggered because the thresholds of 49 CFR 1105.7(d) have not been met. 49 CFR 1105.7(d)(6).

U S Rail's Gabriel Hall previously submitted a verified statement which avers that the amount of traffic anticipates will run about 2,000 car loads per year. See Hall Aug. 17, 2007 V.S. at paragraph 7. Assuming daily service, five days per week 50 weeks per year, the daily traffic volume will be eight cars per day, sufficient for one round trip per day, but not three or more. Further assuming that each one of those car loads represents four inbound or outbound trucks, the rail traffic translates into 32 truck loads. Accordingly, there is no basis for Board review insofar as the projected traffic falls way below the Board's environmental thresholds. Morristown & Erie Railway - Modified Certificate, STB Finance Docket No. 34054 (served June 22, 2004).

In short, DEP seeks revocation or rejection based upon mere speculation. Its counsel candidly uses such indefinite terms such as "suspects", "believes" (two recurrences), "concerned", "has ample reason to believe" in attempting to cast doubt upon the legitimacy of U S Rail's exemption. Furthermore, DEP would subject U S Rail to regulation on account of guilt by association to other, unrelated short lines and their common retention of local New Jersey counsel. These are not the specific concerns of which

Section 10102 speaks, and should not operate as grounds for any relief for the DEP.

CONCLUSION

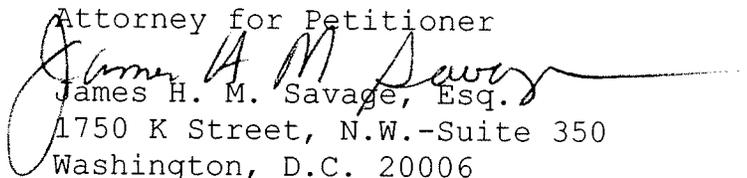
For the above stated reasons and based upon the above cited points and authorities, the Board should deny the DEP's Petition insofar as it seeks to deny U S Rail's use of the exemption process, as the DEP has failed meet its burden to establish reasonable, specific bases for either revoking or rejecting U S Rail's notice of exemption.

Respectfully submitted,



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Dated: August 30, 2007

EXHIBIT A

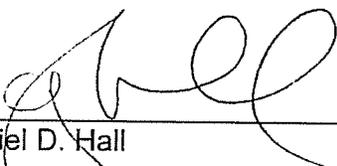
VERIFIED STATEMENT OF GABRIEL HALL

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

Gabriel Hall, of full age, being duly sworn, deposes and says:

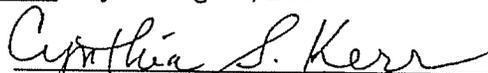
1. I am the President of U S Rail Corporation (U S Rail). My office address is 7846 Central Avenue, Toledo, Ohio.
2. I make this verified statement in reply to the petition for leave to intervene filed by the New Jersey Department of Environmental Protection (DEP), based upon my personal knowledge as well as upon facts known to me in my capacity as officer of this corporation.
3. U S Rail acknowledges that its general counsel had previously represented to the Board in a letter dated January 25, 2006 that a substantial amount of its traffic involved the transportation of solid waste matter. While this statement was true at the time the letter was written, circumstances have changed. U S Rail has not engaged in the business of hauling solid waste since April 2006, and has no plans to perform solid waste transloading operations at the proposed Paterson facility.

FURTHER AFFIANT SAYETH NAUGHT



Gabriel D. Hall

Sworn to and subscribed in my presence this 30 day of August, 2007.



Notary Public

CYNTHIA S. KERR
Notary Public, State of Ohio

stamp

My commission expires: My Commission Expires 09-06-2011

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the foregoing Reply of U S Rail Corporation to Opposition Statement of the City of Paterson, NJ was served on August 30, 2007 to the following:

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