STB FINANCE DOCKET NO. 34145

BULKMATIC RAILROAD CORPORATION
–ACQUISITION AND OPERATION EXEMPTION–
BULKMATIC TRANSPORT COMPANY

Decided May 9, 2003

The Board is denying reconsideration of its prior decision holding that: (1) it has licensing authority over, and thus authority to exempt from regulation, the licensing of the Bulkmatic Railroad Corporation; and (2) the statutory criteria for revocation of the exemption have not been met.

BY THE BOARD:

We are denying the petition of Joseph C. Szabo, for and on behalf of the United Transportation Union-Illinois Legislative Board (UTU-IL), for reconsideration of our decision which denied a request to revoke the exemptions in these proceedings.[1]

BACKGROUND

At issue in these proceedings is an attempt to create a new railroad to link a rail-truck transloading facility at Chicago Heights, IL, known as the Bulkmatic Distribution Center, with connecting line haul railroads. Prior to December 2001, the Distribution Center was operated by Bulkmatic Transport Company (BTC), a motor common carrier that uses rail service to move some of its traffic.[2]

The facility is located on some 98 acres of real estate in Cook County, IL. Approximately 3.9 miles of rail track and related transloading and warehouse

[1] This decision embraces STB Finance Docket No. 34179, *Bulkmatic Railroad Corporation–Operation Exemption–Bulkmatic Transport Company*. These proceedings have not been consolidated. They are being considered together in this decision for administrative convenience.

[2] This operation appears to involve the unloading/reloading of goods between rail cars and truck trailers or containers, although some goods are stored in warehouses prior to transfer. The commodities may be bulk or non-bulk and may be handled in hopper, tank, or box cars.

facilities are located on the acreage. The rail trackage (herein, the Chicago Heights Track) connects at its southeast end with the Union Pacific Railroad Company (UP) and at its northeast end with the Elgin, Joliet, and Eastern Railway Company (EJ&E). Prior to these proceedings, the Bulkmatic Distribution Center was receiving rail service from UP train crews operating over the Chicago Heights Track.

By notices jointly filed on December 21, 2001, in STB Finance Docket No. 34145 and 34146, respectively, Bulkmatic Railroad Corporation (BRC), then a noncarrier, invoked our class exemption at 49 CFR 1150.31 to allow it to become a rail carrier by subleasing the Chicago Heights Track from BTC for railroad purposes, and the Chicago Heights Switching Company (CHSC), also a noncarrier, invoked our class exemption to allow it to operate over that trackage as a common carrier by railroad. The joint notices stated that the Chicago Heights Track was subject to our jurisdiction under 49 U.S.C. 10901 – and was not excepted track under 49 U.S.C. 10906[3]–because it would be used as a line of railroad by BRC and CHSC (herein collectively, respondents). In support of this argument, respondents cited *Effingham RR Co. – Pet. for Declaratory Order*, 2 S.T.B. 606 (1997), *reconsideration denied*, *Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL, et al.*, STB Docket No. 41986, *et al.* (STB served September 18, 1998), *aff'd sub nom. United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999) (*Effingham*).[4]

By decision served on December 27, 2001, the Board denied a UTU-IL request to stay the notices in STB Finance Docket Nos. 34145 and 34146. The exemptions became effective on December 28, 2001, 7 days after the notices were filed, and notices of exemption were published in the *Federal Register* at

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[3] Section 10906 provides:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

[4] In *Effingham*, we found that, although the track at issue had been operated by another carrier as an exempt siding or spur, the intended use of the track by the new carrier was different. Because the intended use of the track, and not the character of the track, was dispositive, we determined that the new carrier's becoming the operator was the proper subject of a notice of exemption. The track segment was that carrier's entire line of railroad and was not, to that carrier, a siding or spur excepted under 49 U.S.C. 10906.

67 Fed. Reg. 2010-2011 (2002). When the exemptions became effective, BRC was authorized to acquire the Chicago Heights Track by sublease and CHSC was authorized to operate over the line pursuant to an operating agreement with BRC.

Shortly thereafter, BRC decided that it wanted to operate over the Chicago Heights Track itself instead of having CHSC conduct those operations pursuant to trackage rights. Accordingly, by notice filed under 49 CFR 1150.31 on February 27, 2002, in STB Finance Docket No. 34179, BRC invoked the class exemption at 49 CFR 1150.31, *et seq.*, so that it could conduct the operations itself. The notice specified that BRC might contract with CHSC for the latter to provide service over the line solely as an agent of BRC. On March 4, 2002, UTU-IL filed a request to stay, reject, and revoke the notice, and also to revoke the exemption in STB Finance Docket No. 34145.

By decision served on March 5, 2002, the Board (a) denied UTU-IL's requests to stay and/or reject the exemption noticed in STB Finance Docket No. 34179, and (b) stated that the request to revoke the exemptions would be addressed in a subsequent decision. The exemption in STB Finance Docket No. 34179 became effective on March 6, 2002, and notice of it was published in the *Federal Register* at 67 Fed. Reg. 11547-48 (2002).

BRC began providing rail service over the Chicago Heights Track on April 2, 2002. BTC does not operate over any trackage at the Bulkmatic Distribution Center, and BTC is now being served by BRC pursuant to an agreement reached with that new carrier on January 1, 2002.

By decision in *Bulkmatic RR.–Acquire and Operate–Bulkmatic Transport*, 6 S.T.B. 481 (2002) (*November 2002 decision*), we denied UTU-IL's request to revoke the exemptions in STB Finance Dockets Nos. 34179 and 34145. Our decision found that we had licensing authority over the transactions, and thus authority to exempt them, rejecting UTU-IL's arguments that: (1) the transaction is a sham because BRC will not be operating as a common carrier; and (2) notwithstanding *Effingham*, the trackage is excepted switching track under 49 U.S.C. 10906. After confirming our licensing authority over the transactions, we found that UTU-IL had not met the criteria of 49 U.S.C. 10502(d) for revocation of the exemptions.

By petition filed on December 9, 2002, UTU-IL requests reconsideration of our *November 2002 decision* denying its petition to revoke the exemptions. BRC replied on December 27, 2002.

PRELIMINARY MATTER

Attached to UTU-IL's petition for reconsideration is a verified statement prepared by Dennis G. Martz. UTU-IL maintains that the information therein is not cumulative and "was not previously presented because the subject matter was highlighted in the Board's November 19, 2002 decision." BRC opposes admission of this statement, arguing that: (1) the facts stated in the first three numbered sections could have been submitted previously; and (2) while the information pertaining to labor effects in the fourth numbered section is "new evidence," it is not relevant.

Under 49 CFR 1115.3(c), evidence submitted in a petition for reconsideration must not be cumulative, and the party seeking to submit it must explain why it was not previously submitted. None of the information appears to be cumulative. However, the information in numbered sections 1 and 2, relating to BTC operations and the BRC lease, will be excluded because it could have been submitted by UTU-IL in its statement filed on May 1, 2002.

We will accept the information in numbered sections 3 and 4, except for the remarks in the second paragraph of numbered section 3 about the prevalence of "industrial switching" (remarks that could have been submitted previously). The information that we are accepting could not have been submitted by the May 1, 2002 close of the record because it deals with events that have been ongoing since then. The information that we are accepting in numbered section 3 presents more recent information on: (1) the use of BRC by shippers since BRC's commencement of operations in April 2002; and (2) whether BRC is listed in a trade publication. The information in numbered section 4 deals with the more recent effects on employees of BRC's commencement of operations, covering a period of about 8 months after the actual commencement of operations by BRC in April 2002. This information also could not have been submitted by the May 1, 2002 close of the record because the record closed only a month after BRC began operations.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3, a petition for reconsideration of a decision of the entire Board will be granted only if the petitioner shows that (1) the prior action will be "affected materially" because of "new evidence or changed circumstances" or (2) the prior action involves "material error." UTU-IL has met neither requisite for reconsideration here.

Licensing Authority over Transaction. UTU-IL submits that the first issue here is whether the track in the Distribution Center, when acquired by BRC, had its status changed from "excepted" under 49 U.S.C. 10906 to track subject to the licensing provisions of 49 U.S.C. 10901. In this regard, UTU-IL claims that we erred by relying on *Effingham*, arguing that decision overturned precedents established in numerous cases that dictated a different result. However, our decision in *Effingham* has been upheld on appeal. The analysis conducted in *Effingham*, and the intended use test applied therein, represent an application of our governing statute that is well established, as shown in the decisions cited in our prior decision.[5] We will apply this well-established precedent.

Statutory Standard for Revocation of an Exemption. UTU-IL claims that our prior decision misapplies the statutory standard for revocation by erroneously interpreting section 10901(c) to mean that we need not enter specific findings pertaining to the public convenience and necessity, and need find only that there has been no showing that the public convenience and necessity is not satisfied. According to UTU-IL, this interpretation is shown by the inclusion of the word "affirmatively" in the following portion of our decision (6 S.T.B. at 489):

> Under section 10901(c), we are required to issue authority to BRC unless we find affirmatively that such authority would be "inconsistent with the public convenience and necessity." Thus, to revoke the exemption in accordance with *Village of Palestine*, we must find that BRC's commencement of operations would be inconsistent with the provisions of the rail transportation policy that relate to the public convenience and necessity, without regard to the other provisions. [Citation omitted.]

We disagree. In our prior decision we cited the lead case of *Village of Palestine*[6] and stated that: (1) the statutory standard of revocation under 49 U.S.C. 10502(d) is whether regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) in making this determination, we are to examine the provisions of that policy that relate to the underlying statutory provision from which exemption was obtained, here section 10901(c).

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[5] Moreover, this line of authority is not of recent creation: *see Operation of Lines by Coal River & Eastern Ry. Co.*, 94 I.C.C. 389, 398-90 (1925), where the ICC certificated a new railroad in the face of an opposing argument by a connecting line haul railroad that the lines were spur tracks, relying on the fact that the new carrier's tracks were its entire line of railroad.

[6] *See Village of Palestine v. ICC*, 936 F.2d 1335 (D.C. Cir. 1991) (*Village of Palestine*); *Missouri Pac. R. Co. – Aban. Exempt. – Counties in Oklahoma*, 9 I.C.C.2d 18, 25 (1992); and *Minnesota Comm. Ry., Inc. – Trackage Exempt. – BN RR Co.*, 8 I.C.C.2d 31, 35-38 (1991), *aff'd, Winter v. ICC*, 992 F.2d 824 (8th Cir. 1993).

In applying this standard, we did not misinterpret the meaning of section 10901(c). That statutory standard, as amended by ICCTA, requires the Board to approve a proposal under section 10901 *unless* we find "it to be *inconsistent* with the public convenience and necessity."[7] The above-quoted language does not imply that we need not make findings pertaining to the public convenience and necessity based on a complete record. Rather, the word "affirmatively" merely emphasizes that there must be enough evidence in the record to justify a finding that an operation proposed for licensing would be inconsistent with the public convenience and necessity before the agency may deny a certificate.

Moreover, UTU-IL's concern with who has the burden of proof or persuasion under section 10901(c) is misplaced. That issue has no relevance to this proceeding. Our prior decision did not turn on who has that burden. Rather, our analysis focused on the provisions of the rail transportation policy that overlap factors that would be considered in a licensing proceeding under section 10901(c).

Employment Consequences. UTU-IL has argued throughout this proceeding that the exemption will take work and earnings away from UP crews, contrary to the rail transportation policy favoring fair wages and suitable working conditions in the railroad industry [*see* 49 U.S.C. 10101(11)]. In our prior decision, we did not reach UTU-IL's argument on hardship to UP employees, instead noting (6 S.T.B. at 489) that UTU-IL did not provide specific information on such hardship. In the statement of witness Martz, UTU-IL now provides information on lost overtime and has named specific UP employees alleged to be suffering adverse consequences. BRC does not dispute this specific information.

However, BRC argues that information on the employment consequences of this transaction is not relevant to the exemption revocation criteria, and we agree. As discussed above, the standard is whether revocation is necessary to carry out those provisions of the rail transportation policy of 49 U.S.C. 10101 that relate to the underlying statutory provision from which the exemption has been obtained. Here, the underlying statutory provision is 49 U.S.C. 10901. Under section 10901(c), we may not subject new carriers like BRC or others to

[7] Before ICCTA, section 10901 *allowed* the ICC to authorize a proposed section 10901 transaction *if* it found it to be *consistent* with public convenience and necessity. *See* 49 U.S.C. 10901(c) (1995).

labor protection conditions.[8] Clearly, then, it would be inappropriate for us to revoke the exemption under the rail transportation policy because of the adverse labor consequences alleged by UTU-IL, because Congress has determined that labor protection shall not be imposed for these types of transactions as part of our public interest analysis.

Operation of Trackage by Agent. UTU-IL claims that we erred by stating that BRC would operate "over" the tracks (perform the operations with its own crews) rather than merely "operate" the track (be responsible for operations performed by others), and by stating that CHSC would act as BRC's agent. UTU-IL's technical distinction regarding operation is of no import here.[9] Further, our decision (6 S.T.B. at 486) recognized that BRC would be hiring CHSC as a contractor-agent and that this does not affect our licensing authority over the transaction. Contrary to what UTU-IL maintains, the agreement between BRC and CHSC clearly provides that CHSC will be only an agent of BRC.

BRC's Operational Efficiency. During the prior stage of this proceeding, UTU-IL argued that the exemption should be revoked because BRC's operation would be inefficient and waste fuel, contrary to the rail transportation policies of sections 10101(3), (9), and (14). Our *November 2002 decision* (6 S.T.B. at 489) rejected this argument, finding that UTU-IL had not borne its burden of demonstrating inefficiency or service deficiency. In making this finding, we remarked in a footnote (6 S.T.B. at 489 n.16) that the issue of BRC's efficiency would require further study before we could find that BRC would not be efficiently operated. In its petition for reconsideration, UTU-IL argues (at 15) that our remark about the need for further study calls for revocation of the exemption pending such study.

We disagree. UTU-IL has the burden of proving that the exemption should be revoked for reasons of operational inefficiency, and has still not met this burden. Our remark about the need for further study was intended merely to

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[8] Prior to the January 1, 1996 effective date of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (Dec. 29, 1995) (ICCTA), our predecessor agency, the Interstate Commerce Commission, had the authority to subject the creation of new carriers to labor protective conditions. In ICCTA, Congress amended section 10901(c) by specifically withdrawing that authority.

[9] Indeed, UTU-IL acknowledges (at 9) that the discussion in the decision of what actually transpired is correct.

indicate that UTU-IL's allegation of inefficiency would need to be supported by credible evidence. It is not.

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

It is ordered:

1. The petition for reconsideration is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nober and Commissioner Morgan.