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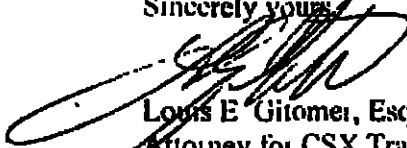
Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

RE: Finance Docket No. 35137, *The Indiana Rail Road Company—Truckage
Rights Exemption—CSX Transportation, Inc*

Dear Acting Secretary Quinlan:

CSXT is e-filing this Opposition to a Petition to Revoke. I thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer, Esq.
Attorney for CSX Transportation, Inc

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35137

THE INDIANA RAIL ROAD COMPANY—TRUCKAGE RIGHTS EXEMPTION—
CSX TRANSPORTATION, INC

OPPOSITION OF CSX TRANSPORTATION, INC. TO UNITED TRANSPORTATION
UNION AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN'S
PETITION TO REVOKE

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Dated July 9, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35137

THE INDIANA RAIL ROAD COMPANY—TRACKAGE RIGHTS EXEMPTION—
CSX TRANSPORTATION, INC.

OPPOSITION OF CSX TRANSPORTATION, INC. TO UNITED TRANSPORTATION
UNION AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN'S
PETITION TO REVOKE

CSX Transportation, Inc. ("CSXT") opposes the Petition to Revoke (the "Petition") filed on June 19, 2008 by the United Transportation Union and the Brotherhood of Locomotive Engineers and Trainmen ("Petitioners"). CSXT requests that the Surface Transportation Board (the "Board") deny Petitioners' request to revoke the Notice of Exemption that permits The Indiana Rail Road Company ("INRD") to operate pursuant to non-exclusive limited local trackage rights over about a nine mile line of CSXT between the connection of CSXT and INRD at Sullivan, IN, about milepost OZA 205.5, and the connection between CSXT's line and tracks leading to the Sunrise Coal Company ("Sunrise") loading facility at Carlisle, IN, about CSXT milepost OZA 214.5 (the "Line") (the "Transaction").

CSXT urges the Board not to revoke the Notice of Exemption filed by INRD simply because it did not state that INRD is controlled by CSXT. Petitioners were not misled or prejudiced by the Notice, nor do they claim to have been. They have been long aware that CSXT controls INRD.

BACKGROUND

In 1996, CSX¹ acquired a controlling stock interest in INRD's parent, Midland United Corporation ("Midland United") pursuant to an application granted by the Board after a public proceeding.¹ INRD had been formed as an independent company in 1986 to acquire lines of the former Illinois Central Railroad. CSX¹ currently owns 85% of the common stock of Midland United, which in turn owns 100% of the common stock of INRD. Thomas G. Hoback, a founder and President of INRD and of Midland United, owns the remaining 15% of Midland United's common stock. Neither Midland United nor INRD has any outstanding or authorized stock other than the common stock. At the time CSX¹ acquired control of INRD, it was contemplated that INRD would remain a separate short line or regional railroad and would not be functionally integrated into CSX¹. This approach has been followed and INRD retains its separate management, engineering, operating, mechanical, marketing, and labor relations functions.

Sunrise, which is located off of a CSX¹ main line that runs between Chicago, IL and Nashville, TN, has been selected as a source of additional coal for two electric utility plants, one located in Indianapolis, IN and the other located in Merom, IN, both on the INRD. An operation requiring the interchange of traffic between CSX¹ and INRD is not operationally or cost effective. To accommodate the desire of Sunrise and the utilities for single-line service, INRD sought and CSX¹ granted trackage rights to INRD over the Line. Through the use of the trackage rights INRD will be able to provide single line service from the Sunrise coal mine to the electric utilities. Service from Sunrise to the utilities will not depend on an interchange between

¹ *CSX Corporation and CSX Transportation, Inc.,—Control—The Indiana Rail Road Company*, STB Finance Docket No. 32892 (STB served November 7, 1996) (the "INRD Control Decision")

CSXT and INRD

INRD filed a Notice of Exemption on April 29, 2008 pursuant to 49 C.F.R. §1180.2(d)(7) (the "Notice"). INRD clarified the Notice by a filing made on May 8, 2008, amended the Notice by an Amended Notice of Exemption filed on May 21, 2008, and submitted maps by letter dated May 22, 2008. All of the filings by INRD will be referred to as the "Notice." The Board served a Notice of Exemption on May 15, 2008² and May 22, 2008.³

Petitioners filed the Petition on June 19, 2008. The majority of the Petition (pages 2-7) summarizes of the Trackage Rights Agreement dated as of May 15, 2008 (the "Agreement") between CSXT and INRD. The Agreement is a standard CSXT trackage rights agreement that has been used in numerous transactions. As the landlord in trackage rights transactions, CSXT includes many provisions in a trackage rights agreement to protect the specific property involved and CSXT's entire franchise. Whether the trackage rights' tenant is independent of CSXT or controlled by CSXT, CSXT requires the same protection in its trackage rights agreements, unless there are unusual circumstances, which do not exist in the Transaction. Historically, trackage rights have been granted between commonly controlled railroads.

Petitioners argue that the Notice is false and misleading because INRD did not state that it is controlled by CSXT, that the false and misleading Notice is void *ab initio*, and that because the Notice is void *ab initio*, it must be revoked. CSXT disagrees.

² *The Indiana Rail Road Company—Trackage Rights Exemption—CSX Transportation, Inc.*, STB Finance Docket No. 35137 (STB served May 15, 2008).

³ *The Indiana Rail Road Company—Amended Trackage Rights Exemption—CSX Transportation, Inc.*, STB Finance Docket No. 35137 (STB served May 22, 2008).

ARGUMENT

The Board has stated that

Under 49 U.S.C. 10502(d), we may revoke an exemption, in whole or in part, if regulation is necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101. We may exercise that revocation authority to protect the integrity of our processes. *Minnesota Comm. Ry., Inc.—Trackage Exempt—BN RR Co.*, 8 I.C.C.2d 31, 37 (1991). The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that regulation of the proposal is necessary. *I&M Rail Link LLC—Acquisitions and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway*, STB Finance Docket No. 33326 *et al.* (STB served Apr. 2, 1997), *aff'd sub nom. City of Ottumwa v. STB*, 153 F.3d 879 (8th Cir. 1998). Here, UTU seeks revocation on the grounds that the notices allegedly contain false and misleading information, but, as discussed below, UTU has failed to substantiate its claims. Accordingly, UTU has not shown that revocation is warranted.⁴

Petitioners do not invoke the rail transportation policy nor do they demonstrate that the integrity of the Board's process requires revocation of the Transaction. Therefore, CSXT respectfully requests the Board to deny the Petition.

I. The rail transportation policy does not require revocation of the Notice.

Trackage rights have been found to foster the rail transportation policy.⁵ The Transaction will permit INRD to provide efficient single-line service for a new transportation move of coal from a mine to the users of the coal. Petitioners do not argue that revocation of the Notice is required to carry out the rail transportation policy. Nor do Petitioners cite to any provisions of the rail transportation policy that require revocation. Therefore, Petitioners have not

⁴ *Progressive Rail Inc.—Continuance in Control Exemption—Montgomery Short Line LLC*, STB Finance Docket No. 35092 and *Montgomery Short Line LLC—Lease and Operation Exemption—Union Pacific Railroad Company*, STB Finance Docket No. 35093 (STB served February 13, 2008) at 2.

⁵ *Railroad Consolidation Procedures*, 1 I.C.C.2d 270, 275-276 (1985) (the "Trackage Rights Exemption").

demonstrated that the rail transportation policy requires revocation of the Notice

II. Revocation is not required to protect the integrity of the Board's processes.

The integrity of the Board's processes does not require protection because the Notice does not conceal information and does contain the information required by the Board's rules,⁶ and the Agreement is not onerous, but merely the standard CSX I trackage rights agreement

A. The Notice contains the information required by the Board and does not conceal information.

The Board requires a notice of exemption filed seeking trackage rights to contain the information required by 49 C F R §1180 6(a)(1)(i, ii, and iii), (5), (6), and (7)(ii), a statement of the applicable labor protective conditions, and a caption summary. A review of the Notice demonstrates that all of the required information has been supplied. Identity of the party controlling the entity seeking trackage rights is not required. Regardless, CSXT's control of INRD is publicly known, having been granted by the Board.

In the title, INRD provides the names of the applicants and the nature of the proposed transaction, and beneath the title indicates the name, title, business address, and telephone number of the person to whom correspondence with respect to the application should be addressed.⁷

On page 3 of the Notice, INRD describes the proposed transaction.⁸ A brief summary of the proposed transaction, the name of applicants, their business address, telephone number, and the name of the counsel to whom questions regarding the transaction can be addressed is provided on pages 3-4.⁹ The proposed time schedule for consummation of the proposed

⁶ 49 C F R §1180 4(g)

⁷ 49 C F R §1180 6(a)

⁸ 49 C F R §1180 6(a)(1)

⁹ 49 C F.R. §1180 6(a)(1)(i)

transaction is stated on page 4 of the Notice¹⁰ The purpose sought to be accomplished by the Transaction is also described on page 4 of the Notice¹¹

INRD lists the States where its property was situated on page 4 of the Notice¹² A map of the Line is in Exhibit 1 attached to the Notice¹³ The Agreement is attached as Exhibit 2 to the Notice¹⁴

On page 5 of the Notice, INRD states that labor protection would be provided pursuant to *Norfolk and Western Ry Co -Trackage Rights- BN*, 354 I C C 605 (1978), as modified by *Mendocino Coast R Inc -Lease and Operate*, 360 I C C 653 (1980) (the "Labor Protection").¹⁵ Finally, a caption summary is attached as Exhibit 3¹⁶

Despite INRD's specific compliance with the Board's rules, Petitioners intimate that the Notice contains false or misleading information because INRD does not state that it is controlled by CSXT Petitioners rely on Interstate Commerce Commission (the "ICC") precedent that rejected a Notice of Exemption for failing to mention the identity of interests between a buyer and seller¹⁷ The facts in *Sagamore* and the Notice warrant different conclusions

In *Sagamore*, the Indiana Hi-Rail Corporation ("IHR") sought to sell 398 miles of rail line to Sagamore National Corporation ("SNC") under 49 U S C §10901 The identity of interest between Sagamore and IHR was not publicly known The ICC found that the transaction was essentially a sham for the purpose of evading labor protection and denied the parties the use

¹⁰ 49 C F R §1180.6(a)(1)(ii)

¹¹ 49 C F R §1180.6(a)(1)(iii)

¹² 49 C F R §1180.6(a)(5)

¹³ 49 C F R §1180.6(a)(6)

¹⁴ 49 C F R §1180.6(a)(7)(ii)

¹⁵ 49 C F R §1180.4(g)(1)(i)

¹⁶ 49 C F R §1180.4(g)(2)(i)

¹⁷ *Sagamore National Corporation-Acquisition and Operation Exemption-Lines of Indiana Hi-Rail Corporation*, ICC Finance Docket No. 32523 (ICC served June 29, 1994) ("*Sagamore*")

of the notice of exemption process¹⁸

The Notice here has been filed under 49 U.S.C. §11323. In contrast to the facts of *Sagamore*, it is a matter of public record that INRD is controlled by CSXT. Such control was approved by the Board in the *INRD Control Decision*. Indeed, Petitioners do not actually claim to have been misled or prejudiced by the Notice's failure to state that CSXT controls INRD. Nor could they, because they are well aware of this public fact. For example, UTU participated in the *INRD Control Decision* proceedings. BLET represents the train and engine service employees on INRD and represents engineers on CSXT. In 1997, UTU and BLET (then BLE) were in competition to represent INRD's train and engine service employees. After a recount, the National Mediation Board ("NMB") certified the BLET as the representative of such INRD employees. *The Indiana Rail Road Co.*, 25 NMB 251 (1998). INRD subsequently complained to the NMB that UTU interfered with the election by telling INRD employees they would lose their jobs unless they voted for a union because INRD was controlled by CSXT. Both UTU and BLET argued that the NMB should deny INRD's objections to the election. This again shows that UTU and BLET have been aware for more than ten years that CSXT controls INRD.

While Petitioners also argue that this trackage rights transaction is a "subterfuge" for CSXT to avoid "its collective bargaining agreement obligations to BLET and UTU," Petition at 1, Petitioners do not specifically state what collective bargaining agreements obligations CSXT supposedly is avoiding. Significantly, Petitioners do not claim that this trackage rights arrangement violates any collective bargaining agreement, of either CSXT or INRD.

Moreover, the Board has imposed Labor Protection on this trackage rights arrangement

¹⁸ See *Sagamore National Corporation-Acquisition and Operation Exemption-Lines of Indiana Ill-Rail Corporation*, ICC Finance Docket No. 32523 (ICC served June 29, 1994, August 26, 1994, September 9, 1994, September 20, 1994, October 28, 1994, November 4, 1994, and December 16, 1994).

Indeed, revocation of the Notice would require INRD and CSXT to file an application. Since it is clear that the Transaction is pro-competitive, CSXT contends that the Board would be required to grant the application and impose the same level of labor protection as it imposed on the Notice. The only result would be the delay in single-line service to Sunshine and the electric utilities. The employees of CSXT and INRD would be in the same position, although the delay may result in the diversion of the new traffic and reduced employment.

In this proceeding, INRD is a carrier seeking to commence common carrier operations as a tenant over the Line owned by CSXT. As such, INRD was required to obtain advance approval from the Board to commence operations under 49 U.S.C. § 11323. In order to expedite and encourage the pro-competitive operations created by the operations of trackage rights, a class exemption from the approval process under section 11323 was adopted.¹⁹ The Board's rules implementing the exemption require a party filing a notice of exemption to provide certain information and to verify the accuracy of the information presented.²⁰ As described above, the Notice filed by INRD complies with the Board's rules. The accuracy of the information in the notice was verified by Mr. Thomas G. Hoback, President and Chief Executive Officer of INRD.²¹

Petitioners "must demonstrate that the notice contains false or misleading information."²² In *Minnesota Northern*, the labor petitioners made five specific arguments concerning false and misleading information that was contained in the notice in that proceeding. The Board rejected all of petitioner's arguments concerning false and misleading information because they were

¹⁹ *The Trackage Rights Exemption*

²⁰ 49 C.F.R. §1180.4(g)(1)

²¹ Notice at 7

²² *Minnesota Northern Railroad, Inc. -Exemption-Acquisition and Operation of Rail Line and Incidental Trackage Rights from Burlington Northern Railroad Company*, STB Finance Docket No. 33315 (STB served August 14, 1997), at 3 ("*Minnesota Northern*")

minor, of no consequence, or *de minimis*.²³ In this proceeding, Petitioners have not made any specific claims as to those portions of the Notice that are false or misleading. The identity of the party controlling a trackage rights tenant is not required by the Board's regulations. As the parties that must "demonstrate" false and misleading information, Petitioners have failed to meet their burden. As explained, Petitioners do not specifically claim that they were misled by the Notice.

Since there has been no demonstration of false and misleading information by Petitioners, CSXT respectfully requests the Board to deny Petitioners' request to revoke the Notice on that basis.

B. The Agreement does not provide a basis for revocation.

Petitioners contend that in this proceeding CSXT retains "all-encompassing controls over INRD's operations over this Line." Petition at 7. CSXT retains ownership of the Line, continues to operate over the Line, and continues to be responsible for safe operations of the Line. As the continuing owner of the Line, and an operator of the Line, CSXT must protect its assets and arrange for safe operations through the Agreement. CSXT has used its typical trackage rights agreement to fulfill these obligations.

Petitioners argue that "this transaction is obviously a sham that was devised to avoid the more expensive collective bargaining agreements in effect on CSX." Petition at 7. Petitioners are wrong. INRD proposes to provide a new service to meet its customers' needs, and the underlying 11323 transaction between CSXT and INRD is "subject to mandatory labor protection" as required.²⁴ The Transaction was structured as trackage rights instead of an interchange between railroads because interchange would not be operationally or cost effective.

²³ *Id.*, at 3-5.

²⁴ See *Sugamore*, August 23, 1994 at 4.

In the Petition, Petitioners identify a number of requirements imposed on INRD through the Agreement. Petitioners conclude that because CSXT has "all-encompassing controls over INRD's operations over this Line, this transaction is obviously a sham devised to avoid the more expensive collective bargaining agreement in effect on CSXT." Petition at 7. Petitioners are wrong.

Whenever CSXT agrees to grant trackage rights to another railroad, CSXT seeks to ensure a smooth transition, to encourage efficient service, and to protect its interests. In entering the Agreement with INRD, CSXT followed these principles. Aside from limiting the movement to coal and only to the specified locations, the instant trackage rights agreement is CSXT's standard trackage rights agreement that it uses with other railroads. Since CSXT is retaining ownership of the Line and continuing to operate over the Line, CSXT has a substantial interest in protecting its interest in the property and fostering safe operations. That is the purpose of all of the standard trackage rights terms that Petitioners refer to.

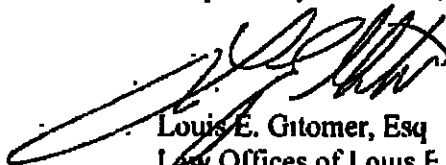
INRD properly sought exemption for its trackage rights over the Line from CSXT under 49 C.F.R. § 1180.4(g). The rights reserved by CSXT were typical for a trackage rights transaction, and for the legitimate purposes discussed above.

CONCLUSION

Petitioners have failed to justify revocation of the exemption in this proceeding because they have not shown that the rail transportation policy or protection of the Board's processes require revocation. The Agreement between CSXT and INRD is a *bona fide* transaction based on substantial business reasons and was not entered into for the purpose of removing work from under CSXT's collective bargaining agreements. Accordingly, CSXT respectfully requests the Board to deny the Petition.

Respectfully submitted,

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Attorneys for CSX TRANSPORTATION, INC.

Dated July 9, 2008.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Opposition of CSX Transportation, Inc to United Transportation Union and Brotherhood of Locomotive Engineers and Trainmen's Petition to Revoke to be served upon counsel for all parties of record by first class mail postage prepaid



Louis E Gitomer
July 9, 2008