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September 25, 2003

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

ENTERED
Office of Proceedings

SEP 25 2003

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Public Record



208981

RE: Docket No. AB-847 (Sub-No. 2X), *Toledo, Peoria & Western Railway Corporation-Discontinuance Exemption-(Between Kenneth and Winamac) in Cass and Pulaski Counties, IN*
Docket No. AB-855 (Sub-No. 1X), *A & R Line, Inc.-Abandonment Exemption-(Between Kenneth and Winamac) in Cass and Pulaski Counties, IN*

208982

Dear Secretary Williams:

Enclosed are the original and 10 copies of a Response and three computer diskettes. Please time and date stamp the additional copy of this letter and the response and return them with our messenger. Thank you for your assistance.

If you have any questions, call or email me.

Sincerely yours,

Louis E. Gitomer
Attorney for A & R Line, Inc. and
Toledo, Peoria & Western
Railway Corporation

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-847 (Sub-No. 2X)



TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION-DISCONTINUANCE
EXEMPTION-(BETWEEN KENNETH AND WINAMAC) IN CASS AND PULASKI
COUNTIES, IN

Docket No. AB-855 (Sub-No. 1X)

- 208982

A & R LINE, INC.-ABANDONMENT EXEMPTION-(BETWEEN KENNETH AND
WINAMAC) IN CASS AND PULASKI COUNTIES, IN

RESPONSE TO COMMENTS

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TOLEDO, PEORIA & WESTERN
RAILWAY CORPORATION

Dated: September 25, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-847 (Sub-No. 2X)



TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION-DISCONTINUANCE
EXEMPTION-(BETWEEN KENNETH AND WINAMAC) IN CASS AND PULASKI
COUNTIES, IN

Docket No. AB-855 (Sub-No. 1X)

A & R LINE, INC.-ABANDONMENT EXEMPTION-(BETWEEN KENNETH AND
WINAMAC) IN CASS AND PULASKI COUNTIES, IN

RESPONSE TO COMMENTS

Toledo, Peoria & Western Railway Corporation ("TP&W") and A & R Line, Inc. ("A&R"), collectively Petitioners, respond to the Comment dated August 25, 2003 (the "Reply") by the Indiana Department of Transportation – Railroad Section ("INDOT") and the Comment dated August 18, 2003 (the "Comment") by the Board of Commissioners – Pulaski County, IN ("Pulaski County").

Petitioners respectfully request that the Surface Transportation Board ("STB") exercise its discretion and accept this Response to the Reply and Comment. Petitioners contend that the Petition for Exemption filed on July 31, 2003 contains all of the information necessary for the Board to grant it, even in light of the Reply and Comment. The issues raised by INDOT and Pulaski County do not address the criteria for exemption, but Petitioners believe that this brief response will clarify the record for the Board.

BACKGROUND

Petitioners filed a Petition for Exemption (the “Petition”) under 49 U.S.C. § 10502 for TP&W’s discontinuance of service over and A&R’s abandonment of A&R’s entire 15.9-mile rail line between milepost 5.1W near Kenneth, IN, and milepost 21.0W, near Winamac, IN, the end of the line, in Cass and Pulaski Counties, IN (the “Line”) from the prior approval requirements of 49 U.S.C. § 10903.¹ The Board issued a notice of the filing. *Toledo, Peoria & Western Railway Corporation—Discontinuance Exemption—in Starke and Pulaski Counties, IN*, STB Docket No. 847 (Sub-No. 1X) (STB served August 20, 2003).

The Line was formerly a main line of The Pennsylvania Railroad Company, which was transferred to the Consolidated Rail Corporation (“Conrail”) in 1976 as part of the Final System Plan. Conrail sold the Line to the Winamac Southern Railway Company (“WSRY”) in 1993. *Winamac Southern Railway Company—Acquisition and Operation Exemption—Lines of Consolidated Rail Corporation*, ICC Finance Docket No. 32257 (ICC served April 7, 1993). WSRY sold the Line to A&R in 1995, but continued to operate over the Line. *A. & R. Line, Inc.—Acquisition Exemption—Winamac Southern Railway Company*, ICC Finance Docket No. 32694 (ICC served July 6, 1995). Cargill Incorporated (“Cargill”) acquired the stock in A&R from Mr. Frick² in 1997, to ensure service to its grain elevator in Winamac at milepost 20.0W (the “Winamac Elevator”). *Cargill, Incorporated—Acquisition of Control Exemption—A & R Line, Inc. and J.K. Line, Inc.*, STB Finance Docket No. 33458 (STB served September 19, 1997).

¹ Contrary to the erroneous innuendo of INDOT, Petitioners do not claim that is has been over two years since rail traffic moved over the Line. Nor have Petitioners used the more expeditious, less burdensome notice of exemption process available under 49 C.F.R. § 1152.50.

² Mr. Frick acquired control of A&R in 1995. *Daniel R. Frick—Continuance in Control Exemption—J.K. Line, Inc., Winamac Southern Railway Company, and A. & R. Line, Inc.*, ICC Finance Docket No. 32693 (ICC served July 6, 1995).

Also in 1997, TP&W leased the Line and began to operate over it. *Toledo, Peoria & Western Railway Corporation—Lease and Operation Exemption—A & R Line, Inc.*, STB Finance Docket No. 33482 (STB served October 16, 1997). Once it closed the Winamac Elevator, Cargill sold A&R to RailAmerica, Inc. (“RailAmerica”) and TP&W.³ *RailAmerica, Inc., et al.—Control and Merger Exemption—A&R Line, Inc., and J.K. Line, Inc.*, STB Finance Docket No. 34269 (STB served December 12, 2002). Prior to selling the Line, Cargill removed the rail yard in Winamac and the track serving the Winamac Elevator.

ARGUMENT

The issues raised by INDOT do not warrant denial of the exemption. Pulaski County’s question concerning trail use and removal of structures on the Line also does not warrant denial of the exemption. Regulation of the abandonment and discontinuance of service is not necessary to carry out the rail transportation policy or protect shippers from market abuse. In addition, the transaction is of limited scope.

1. The Environmental Report.

INDOT claims that the Environmental Report (the “ER”) distributed by Petitioners on July 10, 2003 did not comply with the Board’s rules. Petitioners served the ER dated July 10, 2003 on July 10, 2003 in compliance with 49 C.F.R. § 1105.7(b), in order to give those parties as much information as Petitioners had available at that time. In the transmittal letters accompanying the July 10 ER, Petitioners notified the parties it served in compliance with the rules that they expected to file the Petition on July 30, 2003 and requested comments within three weeks, in accord with 49 C.F.R. § 1105.11.

³ RailAmerica is TP&W’s corporate parent.

Petitioners took the comments they received and incorporated them into the ER dated July 31, 2003 that was filed as Exhibit B to the Petition. Accompanying the July 31 ER in Exhibit 3 were the responses that Petitioners received and incorporated into the ER.

Petitioners have complied with the requirements of 49 C.F.R. § 1105, and will comply with any other requests made by the Board's Section of Environmental Analysis. Petitioners have complied with the Board's rules. INDOT has not demonstrated that the procedures followed by Petitioners in the preparation and distribution of the ER require regulation under the rail transportation policy or to protect shippers from the abuse of market power.

2. There are no issues that require further examination.

INDOT claims that Petitioners understated the volume of traffic on the Line in 2001 and 2002. INDOT claims that in 2001 there were 418 carloads instead of the 301 claimed by Petitioners, and that in 2002 there were 463 carloads instead of the 60 reported by Petitioners.

It is Petitioners belief that INDOT may have confused or combined the reports made by A&R, and its sister railroad the J. K. Line, Inc. ("JK"), which operates in Indiana between North Judson and Monterey. JK transported 761 carloads of soybean and corn in 2001 and **463** carloads in 2002, the same volume suggested by INDOT for A&R. However, INDOT did not justify the traffic volumes it submitted since it elected not to produce the reports. INDOT does not challenge the lack of traffic on the Line for the last year since September 16, 2002. Petitioners have reviewed and verified the accuracy of the traffic data in the Petition. There is no evidence contradicting the absence of traffic since September 16, 2002.

INDOT next claims that there is a need for the Line and the Winamac Elevator because the local economy is focused on agri-business. But, INDOT does not quantify any future

volume, or explain why there will be a return of traffic; much less a growth of traffic when there has been no traffic for the past year.

INDOT also claims that the Winamac Elevator is needed. Petitioners do not own the Winamac Elevator. No affiliates of Petitioners own the Winamac Elevator. Cargill owned the Winamac Elevator and A&R. After the last shipment of grain, Cargill agreed to sell the A&R and removed the yard and track serving the Winamac Elevator before the A&R was sold to TP&W and RailAmerica. The Winamac Elevator that concerns INDOT is no longer connected to the national rail system. Petitioners contend that the Board has no jurisdiction over the Winamac Elevator. Moreover, Petitioners had nothing to do with the termination of direct rail access to the Winamac Elevator, which was done by Cargill, the previous owner of A&R.

INDOT then infers some type of wrong-doing in the purchases and sale of the A&R, because the parties are the same.⁴ As shown above, WSRY purchased the Line from Conrail. There was no corporate relation between WSRY and Conrail. WSRY sold the Line to A&R. WSRY and A&R had no affiliation. Mr. Frick, the owner of A&R sold its stock to Cargill. Mr. Frick and Cargill were separate unaffiliated entities. Cargill leased the Line to TP&W to operate. Cargill and TP&W are not affiliated, and TP&W is not affiliated with Conrail, WSRY,⁵ or Mr. Frick. The Line and A&R have, to TP&W's best knowledge, been the subject of arms-length transaction for the sale and purchase of the Line and A&R. Cargill did not buy the A&R from a

⁴ All of the acquisitions and sales of A&R and the Line were brought before the STB or its predecessor for public review. It would seem that INDOT would have participated in all of those proceedings if it were concerned about the transactions. However, INDOT did not participate in any of those proceedings, much less oppose them. INDOT is now making unjustified accusations without a scintilla of support, and those accusations should be given no weight.

⁵ TP&W does provide some operations for WSRY, but they are not corporate affiliates.

railroad affiliated with Cargill, and even if it did, Cargill sold A&R to TP&W and RailAmerica, neither of which is affiliated with Cargill, Mr. Frick, WSRV, or Conrail.

INDOT questions whether the Line is appropriate for future trail use. Petitioners believe the Line is eligible for trail use, but have received no offers for trail use over the Line. Petitioners have reviewed the structures on the Line and are aware that the structures may have to be removed. Petitioners will comply with their legal obligations, and expect the same from INDOT and Pulaski County.

INDOT claims that the abandonment and discontinuance of service will impact the Winamac State Fish and Wildlife Area and the Tippecanoe River State Park, six miles north of the northern terminus of the Line, and Bass Lake State Fish Hatchery, three miles further north, because there may be additional truck traffic on U.S. Highway 35 through those areas. INDOT has failed to draw a nexus. Even using INDOT's car count for 2002 of 463 carloads, at four trucks per rail carload operating only five days per week for 50 weeks per year, there would be less than eight trucks per day added to local roads. Using Petitioners' 2001 car count of 301 cars would add less than five trucks per day to the highways. There is no indication that all of the traffic moves north on U.S. Highway 35. Indeed, Petitioners' operations from the Winamac Elevator were to the south, away from the park areas, and it is expected that the truck traffic would travel south toward Logansport, not north. In addition, the trucks are already on the highway in order to deliver the grain from the farms to various grain elevators.

3. No misrepresentation of TP&W's intention is involved.

INDOT implies that RailAmerica and TP&W were not forthright about their intentions for the Line when they acquired it from Cargill. RailAmerica and TP&W made their intentions for the Line clear when they sought an exemption from the Board for the acquisition.

“Petitioners state that [TP&W], with the consent and support of Cargill, intends to file a petition for exemption to abandon and discontinue service for the entire 17 miles of line currently operated by [TP&W] and 15 miles of the line currently operated by [TP&W] while the instant petition for exemption is pending. Such a petition will be addressed on its merits, if and when it is filed.” *RailAmerica, Inc., et al.—Control and Merger Exemption—A&R Line, Inc., and J.K. Line, Inc.*, STB Finance Docket No. 34269 (STB served December 12, 2002) at 2. The Board knew that TP&W and A&R intended to abandon and discontinue service over the Line. INDOT also knew since the Board’s decision was published in the Federal Register. 67 *Fed. Reg.* 77315, December 17, 2002.

Petitioners have not misled the Board or anyone else. Petitioners from the very beginning told the Board that they planned to abandon and discontinue service for the Line.

4. Trail use.

INDOT and Pulaski County are both concerned that a trail use would permit Petitioners to avoid the cost of removing structures from the Line, which INDOT and Pulaski County view as the sole responsibility of Petitioners. Petitioners have not received a trail use offer for the Line, but they would carefully consider one if it were received. However, interim trail use is permitted and encouraged by 16 U.S.C. § 1247(d). Trail use is permitted under the law, subject to negotiations between the railroad and prospective trail user.

CONCLUSION

As explained above, INDOT and Pulaski County have not demonstrated that the application of the regulatory requirements and procedures of 49 U.S.C. § 10903 is required to carry out the rail transportation policy set forth in 49 U.S.C. § 10101. Nor have they

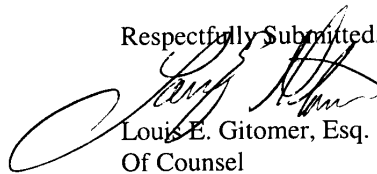
demonstrated that STB regulation is required to protect shippers from the abuse of market power or that this abandonment and discontinuance of service are not of limited scope.

The Petition fully demonstrates that regulation of the proposed transactions is not necessary to carry out the rail transportation policy set forth in 49 U.S.C. § 10101, that regulation is not needed to protect shippers from and abuse of market power, and that the proposed transactions are of limited scope.

Accordingly, Petitioners respectfully urge the STB to deny the relief sought by INDOT and Pulaski County, and instead, grant the proposed abandonment of and discontinuance of service over the 15.9-mile Line.

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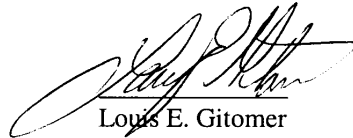
Dated: September 25, 2003

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Response was mailed via first class mail, postage prepaid, on September 25, 2003, to the following parties:

Indiana Department of Transportation
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IGC-N Room N901
Indianapolis, IN 46204-2219

Board of Commissioners-Pulaski County
Courthouse – Room 200
112 East Main Street
Winamac, IN 46996



Louis E. Gitomer
September 25, 2003