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17 February 2004

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

210094

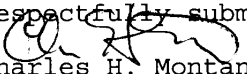
Re: City of Venice -- Abandonment Exemption,
AB 863X

Dear Mr. Williams:

Enclosed for filing please find an original and ten copies of an Opposition by City of Venice to TRRA's "Petition" for leave to file a reply to a reply, with associated exhibit in the event this Board determines to allow TRRA's reply to a reply.

Thank you for your assistance in this matter.

Respectfully submitted,


Charles H. Montange
for City of Venice

ENTERED
Office of Proceedings

FEB 18 2004

Part of
Public Record

Encls

cc. counsel for TRRA per cert. serv.

BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET AB 863X

CITY OF VENICE

ENTERED
Office of Proceedings

FEB 18 2004

Part of
Public Record

-- ABANDONMENT EXEMPTION --

BETWEEN BRANCH STREET YARD, MO
AND MCKINLEY JUNCTION, IL



OPPOSITION BY CITY OF VENICE
TO TRRA'S "PETITION" FOR LEAVE TO FILE A
REPLY TO A REPLY

City of Venice opposes Terminal Railroad Association of St. Louis's (TRRA's) "petition" for leave to file a "Reply" to City of Venice's Reply to TRRA's "Motion for Reconsideration."

As TRRA recognizes, this Board's rules state that replies to replies "are not permitted." 49 C.F.R. § 1104.13(c). As grounds for ignoring this rule, TRRA claims that "Venice ... distorts the evidence of record and misrepresents the holdings of the Board's decisions on which it relies." TRRA Petition p. 2. TRRA's alleged grounds are meritless.

TRRA's claim that Venice is distorting the record is empty rhetoric. This proceeding is not a case turning on some set of disputed material facts, but on the legal conclusions which can be drawn from the material facts. In particular, City and TRRA both seem to agree that the track is eligible for an abandonment exemption under 49 U.S.C. § 1152.50 provided City has a common

carrier obligation to abandon.¹ The only real dispute involves whether City has a common carrier obligation. TRRA contends the City does not. TRRA introduces no new material facts on that issue. The material facts are that City purchased all the assets of Illinois Terminal in a two mile line of railroad and arranged for Illinois Terminal to operate it under a lease-type arrangement. TRRA now contends, as a matter of law, that the purchaser of a rail line does not acquire any common carrier obligation in sale/leaseback situations. City contends, as a matter of law, that the purchaser of a rail line does acquire common carrier obligations in such situations, unless this Board or its predecessor granted an exemption (which did not happen here).²

If 49 C.F.R. § 1104.13(c) is supposed to bring efficiency and closure to motion practice. The idea behind 49 C.F.R. § 1104.13(c) is that a moving party should say all that it has to say the first time, and not put out a trial balloon, get a

¹ For example, TRRA has presented evidence that the line is deteriorated, and TRRA does not contest that it has not been in use for the past two years. The basic criteria for use of § 1152.50 have thus been met. TRRA does not claim that City has failed to provide required notices.

² The legal nature of the dispute is confirmed by the fact that City of Venice did not introduce any new factual "evidence" in its Reply to TRRA's motion for reconsideration (or for that matter to TRRA's earlier "comments"); nor did TRRA file any new statements or evidence with its motion for reconsideration, or with its proposed sur-reply now. Neither party has presented any verified statements, other than the Notice of Exemption which was verified by City of Venice. In other words, this is not a dispute over material facts, but simply over whether the purchaser of a rail line thereby acquires common carrier obligations, residual or otherwise.

reply, and then put in more arguments, or its real arguments, or what it wished it had said the first time. TRRA is here the moving party: it sought reconsideration. It has no reply right. TRRA, in now seeking to reply to a reply, is not doing so to present any new evidence; it is simply seeking to present more legal argument, and indeed, legal argument the gravamen of which involves a Supreme Court decision which dates from 1978. TRRA could have discussed such matters before. TRRA is simply seeking to dishonor the purpose of § 1104.13(c), for the sole purpose of doing exactly what the rule is intended to prevent.

Both the City and the public are prejudiced by continued delay in this proceeding. This Board, at TRRA's request, has stayed the effective date of the abandonment authorization here at issue. That authorization would otherwise be effective. Delay in the authorization poses an obstacle to rehabilitation of the McKinley Bridge. It is difficult for parties to justify expenditures on the kind of rehabilitation for highway purposes for the Bridge until rail common carrier obligations are extinguished. But once an exempt abandonment proceeding is under a "stay," there is no statutory or regulatory time table for decision. Additional out-of-time filings such as TRRA's proposed reply to a reply contribute to further delay in reaching a decision. That delay compounds the prejudice to City and to the public. Since (perhaps ironically) both TRRA and City appear to agree that any extant common carrier obligation on the line should be authorized for abandonment, how

this situation largely created by TRRA contributes to any interest of TRRA, as so far articulated by TRRA, escapes us.

In the event that this Board grants leave to TRRA to file TRRA's proposed Reply, then City on the same grounds proffered by TRRA seeks leave to file a Reply to TRRA's Reply. In particular, City did not misrepresent any cases (the cases speak for themselves anyway) in its legal memoranda to date, but TRRA certainly is false and misleading in its discussion of the "new" authorities which it seeks to call to this Board's attention. This is further demonstrated in City's proposed Reply to TRRA's Reply, attached as Exhibit A, at 1-3. TRRA makes other misleading or false claims, as shown in the proposed Reply to TRRA's Reply at 4 et seq.

Respectfully submitted,

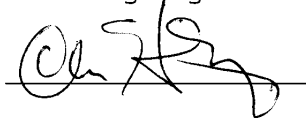


Charles H. Montange
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(206) 546-1936
for City of Venice

Attachment

Certificate of Service

I hereby certify that copies of the foregoing and attachment were served by U.S. Mail, postage pre-paid, first class or equivalent, on 11 February 2004, upon Fritz Kahn, 1920 N Street, NW (8th Fl.), Washington, D.C. 20036-1601 and Rebecca R. Jackson, Bryan Cave LLP, 211 No. Broadway (36th Fl.), St. Louis, MO 63102. The foregoing is also being faxed to Mr. Kahn.



BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET AB 863X

CITY OF VENICE

-- ABANDONMENT EXEMPTION --

BETWEEN BRANCH STREET YARD, MO
AND MCKINLEY JUNCTION, IL

CITY OF VENICE'S REPLY
TO TRRA'S REPLY TO CITY OF VENICE'S REPLY
TO TRRA'S MOTION FOR RECONSIDERATION

The crux of any new argument by Terminal Railroad Association of St. Louis (TRRA) is summed up in its claim (in its proposed Reply at p. 3, numbered paragraph 4) that "the Supreme Court declared in California v. Southland Royalty Co., 436 U.S. 519, 543 (1978), quoting with approval from Meyers v. Famous Realty, Inc., 271 F.2d 811, 814 (2d Cir. 1959), cert. den. 362 U.S. 910 (1960)" that a non-carrier does not become subject to common carrier obligations merely by leasing its property to a common carrier. TRRA's claim profoundly misrepresents both the quoted cases above at several levels.

First, the supposed declaration of the Supreme Court in fact is merely a dictum in a dissenting opinion, in a non-railroad case. The opinion of the Supreme Court dissenters is hardly precedent, and it is false and misleading say it is something declared by the Supreme Court.

Second, the Second Circuit case (Meyers v. Famous Realty, Inc., 271 F.2d 811, 814 (1959)) cited by the dissenters is of

precedential value, but it does not support TRRA either. The Second Circuit did hold that a mere lessor of some parcels used by a railroad does not become a common carrier when the railroad-lessee abandons service. But the Second Circuit in Meyers was dealing with a situation in which a non-railroad with owned some industrial and switching tracks leased some of its property to a railroad for common carrier purposes. The Second Circuit viewed such a situation as analogous to a farmer leasing or granting an easement to a railroad through a farm; as the Court noted, "one renting a patch of cornfield to a railroad would not come under an obligation to operate that railroad if it obtained permission to abandon the operation of its line." 271 F.2d at 815. However, even if this holding were correct, it is significant that the Second Circuit carefully distinguished as different a situation in which a rail carrier sells the "reversion" in its properties to another, and then leases the "reversion" back. The Second Circuit stated that "a carrier-lessor's grantees with notice" may well be obligated "to operate its carrier-properties when they revert to [the grantees] under the terms of the lease or on legal abandonment of operations by the lessee." The Second Circuit continued:

"It would not at all be unreasonable to hold, especially in these days when railroad operations are so often in the red, that a carrier-lessor cannot escape the burden of a potential obligation to operate, by the simple device of deeding its reversion in railroad properties to another, that the status of 'carrier by railroad' and the duties therein involved attach to the grantees of a carrier's railroad properties." 271 F.2d at 815 (emphasis added).

This latter situation (not the one at bar in the Meyers case)

most aptly characterizes the relationship of City of Venice and Illinois Terminal here. More specifically, City of Venice did not simply lease a cornfield or a piece of non-common carrier (private) terminal track to Illinois Terminal; instead, City was the grantee of the carrier's (Illinois Terminal's) railroad properties (the "reversion" in the words of the Second Circuit), at a time when Illinois Terminal was apparently in financial need. The mere fact that City then signed an operating agreement for Illinois Terminal to operate the line the City had acquired does not excuse the City forever from any common carrier obligation itself. In short, Meyers supports the view that City of Venice indeed does have a residual common carrier obligation in the rail line it acquired from Illinois Terminal in 1958.

Third, and even worse for TRRA, the actual majority opinion of the Supreme Court in California v. Southland Royalty Company, supra, cites with approval decisions indicating that a lessor "which had ceased to operate as a railroad prior to enactment of the Interstate Commerce Act" still was "required to seek permission to abandon a railroad line which had reverted to it upon expiration of a lease." 436 U.S. at 529 n.6. In other words, if there is something relevant in the Supreme Court case cited by TRRA, that is the majority's discussion indicating that the party which owns a railroad line which it leases to another for operation nonetheless must obtain permission to abandon the line when the line reverts to it upon expiration of the lease

(as here).

TRRA also claims (proposed Reply pp.3-4 at numbered ¶¶ 6 & paragraph 6) that City of Venice could not have a common carrier obligation since it did not receive a specific authorization from the Interstate Commerce Commission (ICC) to acquire the property. The fact that a party did not seek a required authorization has never heretofore meant that it thereby avoided a common carrier obligation (residual or not) that might otherwise attach, because the common carrier obligation attaches even where the parties overlooked it, made a mistake, or hoped or thought otherwise. E.g., Southern Pacific Transportation Company -- Abandonment Exemption -- Los Angeles County, CA, AB 12 (Sub-no. 139X), 8 ICC2d 495 (1992); City of Austin, TX -- Acquisition -- Southern Pacific Transportation Company, F.D. 30861(A), served Nov. 4, 1986.

The law so far is crystal clear that if a government entity acquires a line, it thereby assumes a common carrier obligation, even if it leases the line to another for operation. The "default" position when a government (or a private party) acquires an operating rail line is that the government (or other entity) also acquires a common carrier obligation -- even if it does not intend ever to operate the line itself. This is the clear holding of City of Austin, supra: in the words of the ICC, Austin "assumed a common carrier obligation, even though it did not intend to operate the line itself, because by acquiring full ownership of the line it necessarily assumed responsibility

for contracting with, and ensuring continued service by, a rail operator." This principle remains the law. E.g., Southern Pacific Trans. Co. -- Trackage Rights Exemption -- Houston Belt & Terminal Rwy; et al., F.D. 33461, et al., served Dec. 21, 1998, 1998 STB Lexis 996, at *29 n.29: "When a non-carrier acquires an active rail line it becomes a common carrier, even if it does not intend to operate the line itself..."

TRRA, not Venice, misrepresents the 1958 decision (327 ICC 70). TRRA points to nothing in the 1958 decision which exempts City of Venice from the kind of residual common carrier obligation typically burdening the purchaser of a rail line in a sale/leaseback situation as articulated in City of Austin. In addition, Illinois Terminal's sale in question was not of "certain assets" (TRRA proposed Reply at 2) but of all assets in the line. TRRA asserts without evidentiary authority that ICC determined that Illinois Central "retained in perpetuity the sole authority to render service as the rail carrier" on the line. TRRA proposed Reply at 2. In point of fact, the Railroad Agreement provided for what amounts to a 50 year lease subject to renewal and also subject to termination prior to the end of any term, including the first term (as happened here).³ The Agreement also authorized Illinois Central to grant trackage rights to other carriers. The Agreement is not dissimilar from

³ Section 3.02 of the applicable Railroad Agreement authorized Illinois Terminal to terminate the agreement prior to the expiration of the initial term or any renewal term provided the bonds employed to finance the transaction were paid off (and Illinois Terminal terminated use and operation of the line).

typical railroad leases entered into by government entities, under which the government entity acquires a residual common carrier obligation (unless the government entity first applies for and obtains an exemption), as indicated in the City of Austin decision. Likewise, the fact that Illinois Central did not relinquish its status as a rail carrier or its common carrier obligation over the line has nothing to do with whether City of Venice acquired a common carrier obligation. See City of Austin, supra, and other cases discussed by City.

TRRA also suggests (proposed TRRA Reply at pp. 5-6, ¶ 9) that City now admits the line is abandoned. This is simply TRRA being misleading and disingenuous. TRRA refuses to acknowledge that both lessor (owner) and lessee (operator) of an operating rail line in a sale/lease situation customarily have common carrier obligations. If City ever admitted or intended to admit that the line was abandoned (i.e., that City's own common carrier obligations had ceased), City would not have filed this proceeding. City certainly admits that Norfolk & Western abandoned its common carrier obligations as to the line (N&W did not otherwise own any property in the line to abandon), and so disclosed in its original Notice of Exemption.⁴ City likewise

⁴ For TRRA to state, as it repeatedly does (e.g., TRRA proposed Reply at 5), that the City was false (lied) in its Notice of Exemption by failing to disclose the Norfolk & Western proceeding indicates that TRRA simply has not read the City's Notice of Exemption. City discussed the N&W proceeding in Exhibit B (pp. 10-11 of the Notice). City referenced the N&W proceeding in relevant notice letters (Exhibit D), and on the first pages of the Environmental Report (Exhibit E) and Historic Report (Exhibit F).

has certified that the line is long unused.⁵ But City certainly has never meant or intended to admit that the line is abandoned in the sense that the City's common carrier obligations somehow thereby ceased to exist. Legal abandonment in that sense requires an authorization from this Board. "The common carrier obligation to serve continues indefinitely; it may be suspended only if formal discontinuance authority or an exemption is granted [citation omitted], and it may be extinguished only if formal abandonment authority or an exemption is granted [citation omitted]." Southern Pacific, supra, at *29. The whole point of this proceeding is the City desires the formal abandonment authorization or exemption necessary to extinguish its common carrier obligations.

City is not in this proceeding to split hairs with TRRA. City initiated this proceeding in a good faith effort to comply with applicable law. Under that law, a party acquiring an operating rail line from a railroad assumes a common carrier obligation, even if the party is a non-carrier which leases the property back to the railroad. Under this Board's (and the ICC's) practice, the non-carrier could seek an order indicating that it was not subject to a common carrier obligation as a

⁵ Notice at p. 7. The environmental report (Exhibit E to the Notice) at p. 3 also states that rail structures are in a deteriorated condition and would require substantial investment to be restored for rail purposes. TRRA has now disavowed any suggestion that disuse constitutes a de facto abandonment, and TRRA now appears to admit that de jure abandonment authority is necessary for City of Venice's common carrier obligation. TRRA proposed Reply at 6 n4.

result of the acquisition, but if it did not seek such an order, then it was subject to common carrier obligations. A common carrier obligation once acquired may only be terminated by authorization of this Board. It follows that City of Venice has properly employed 49 C.F.R. § 1152.50.

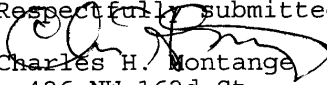
TRRA would not have objected to this proceeding but for Madison County Transit's expression of interest in preserving the rail corridor for possible future rail purposes.⁶ 16 U.S.C. § 1247(d) declares a national policy in favor of preserving rail corridors for reactivation.⁷ TRRA basically seeks to have this Board deviate from established law in order to insure that national policy can not be applied to this line. The very articulation of TRRA's motivation (an effort to frustrate national policy) indicates the absurdity of the relief (unprincipled deviation from the law) it seeks.

TRRA's remaining arguments in its proposed Reply have no merit or misconstrue City's argument. For the convenience of the Board, City is attaching the City of Austin decision. The case speaks for itself.

⁶ E.g., TRRA Pet for Recon at p. 6 ¶8.

⁷ 16 U.S.C. § 1247(d) (2d sentence) states that it is federal policy "to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use...." Id. (1st sentence) calls specifically upon the STB Chairman to "encourage" state and local governments in rail corridor preservation.

Respectfully submitted,


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for City of Venice

Attachment (City of Austin)

CITY OF AUSTIN, TX -- ACQUISITION -- SOUTHERN PACIFIC TRANSPORTATION COMPANY
Finance Docket No. 30861(A)

INTERSTATE COMMERCE COMMISSION

1986 ICC LEXIS 95

October 23, 1986

CORE TERMS: acquisition, exemption, common carrier, milepost, notice, rail line, regulation, abandoned, railroad, rail, printed, line of railroad, certificate, modified, exempt, extending

PANEL:

[*1]

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley. Commissioner Lamboley commented with a separate expression.

OPINION:

The City of Austin, TX (City) has filed a notice of exemption under 49 CFR 1150.31 regarding its acquisition of approximately 162 miles of railroad line in Texas n1 owned and operated by Southern Pacific Transportation Company (SPT). City also has submitted a motion for dismissal of the notice of exemption. The motion will be denied.

n1 The line consists of two segments, one extending from milepost 57.00 near Giddings to milepost 113.4 near Austin, TX, and one extending from milepost 0.00 near Austin to milepost 99.04 near Llano, TX. The line also includes the Marble Falls Branch, from milepost 6.2 near Marble Falls to milepost 0.0 near Fairland, TX.

In its motion for dismissal, City argues that: (1) it is not a carrier subject to the jurisdiction of this Commission; (2) it does not intend to operate n2 the rail line being acquired from SPT or to hold itself out to the public to perform any Commission-regulated activities; (3) it would not attain common carrier status through the acquisition; and, accordingly, [*2] (4) there is no need for the Commission to exempt it from the requirements of 49 U.S.C. 10901, or to subject it to the requirements of 49 CFR 1150.31. City's motion is predicated on *State of Vt. and Vermont Ry., Inc., Acquisition and Op.*, 320 I.C.C. 609, 614 (1964), in which the Commission stated that the mere ownership of rail properties by a State, or a political instrumentality of a State, does not confer common carrier status.

n2 The line will be operated by Austin Railroad Company, Inc. (ARC), under a separate contract to be negotiated between ARC and the City of Austin, for an initial period of 10 years, subject to 3 optional renewals. ARC has filed a notice of exemption under 49 CFR 1150.31 to operate the line in Finance Docket No. 30861(B).

We reject the position advocated by the City of Austin, and find that *State of Vt., supra*, is distinguishable. In that case, the State of Vermont, by statute, was prohibited from operating as a railroad. Furthermore, the State of Vermont sought to acquire an abandoned line of a company (Rutland Railway Corp.), that had ceased to be a common carrier by railroad. n3 In the instant proceeding, by contrast, the City of Austin is acquiring[*3] an operating line of railroad from a rail common carrier (SPT), and there is no indication that Texas statutes preclude it from operating the line.

n3 Since *State of Vermont, supra*, we have concluded in our regulations for modified certificates of public convenience and necessity that the acquisition by a State of a fully abandoned line is not subject to our jurisdiction and the acquisition by a State of a line approved for abandonment, but not fully abandoned, is exempt from our jurisdiction.

1986 ICC LEXIS 95, *

See 49 CFR 1150.22. We do not read either State of Vermont or our modified certificate regulations to stand for the proposition that the acquisition by a State or political subdivision of an active rail line is outside of our jurisdiction.

In essence, City has argued that it is nothing more than a conduit to the eventual operation of the line, with only the prospective operator of the line (ARC) emerging as a common carrier. However, by purchasing an active line of railroad, City not only will assume, from SPT, the common carrier obligation to ensure service over the line, but also will retain this common carrier obligation regardless of whether it operates the line itself or arranges[*4] by contract for someone else to operate it. See Finance Docket No. 30555, Northwestern Pacific Acquiring Corp. and Eureka Southern R. Co. Exemption (not printed), served October 25, 1984; Finance Docket No. 30317, New York, Susquehanna & W. Ry. Co., et al, Exemption (not printed), served June 17, 1985; and Finance Docket No. 30640, Rarus Ry. Corp. -- Exemption (not printed), served April 24, 1986. Therefore, at consummation of the acquisition of the SPT line, City will become a rail common carrier subject to the Commission's jurisdiction. n4

n4 While City has not so requested, it could seek exemption from all or part of Title 49 to relieve it of common carrier obligations. Thus, contrary to City's claim, there need be no "chilling effect" on government acquisitions.

A notice of exemption for City's acquisition of the line will be published in the Federal Register pursuant to 49 CFR 1150.31.

It is ordered:

1. The motion for dismissal of City's notice of exemption is denied.
2. This decision is effective on its service date.

DISSENTBY: LAMBOLEY

DISSENT:

COMMISSIONER LAMBOLEY, commenting:

This acquisition proceeding involving 162 miles of operating rail line may not be limited in scope, however[*5] it is appropriate for exemption under the alternate criterion that regulation is not necessary to protect shippers from the abuse of market power.

The issues are complicated by the fact that it appears unclear whether the City of Austin is willing to assume the common carrier obligation attendant upon this acquisition. At any rate, this issue of the City of Austin's common carrier obligation is thoroughly discussed in our decision and presumably the City of Austin will be able to make an informed decision about consummating this transaction.

I continue to believe that our handling of the labor protection issue with respect to the vendor railroad in these acquisition exemption cases remains a troubling problem.