

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34486

OHIO VALLEY RAILROAD COMPANY

-ACQUISITION AND OPERATION EXEMPTION-

HARWOOD PROPERTIES, INC.

MOTION TO RECONSIDER
PETITION TO REJECT OR REVOKE

EXPEDITED HANDLING REQUESTED

INDIANA SOUTHWESTERN RAILWAY CO.

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Dated: October 22, 2004.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34486

OHIO VALLEY RAILROAD COMPANY
-VERIFIED NOTICE OF EXEMPTION-
HARWOOD PROPETIES, INC.

MOTION TO RECONSIDER
PETITION TO REJECT OR REVOKE

Comes now INDIANA SOUTHWESTERN RAILWAY CO. (“ISW”), and respectfully requests that the Board reconsider its decision of September 24, 2004 denying ISW’s Petition to reject or revoke, *ab initio*, the Verified Notice of Exemption filed by Ohio Valley Railroad Company in Finance Docket No. 34486.

On March 23, 2004, Ohio Valley Railroad Company (“Ohio Valley”) filed a Verified Notice of Exemption with the Board seeking to change the status of certain private yard tracks owned by Harwood Properties, Inc., in Evansville, Indiana, from industrial track operations in a private yard to common carrier operation.

In its Decision of September 24, 2004 (Served September 28k, 2004), the Board denied ISW’s Petition to Reject or Revoke, thereby granting OVR common carrier status under §10901.

The licensing provisions of 49 U.S.C. §10901, however, apply only to those who seek to operate a railroad line. OVR has alleged that it is leasing a private yard. The Board confirms this in its decision, stating that the “Harwood Yard trackage previously may have been used by another carrier either as switching/industrial track excepted from our licensing authority or private yard track entirely beyond our jurisdiction, that same

trackage will now constitute OVR's entire line of railroad...." There is no evidence that the character of the operation has changed. Indeed, the evidence is the contrary.

"The Board does not have authority," pursuant to 49 U.S.C. §10906, over the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks." See also Nicholson v. Interstate Commerce Commission, 711 F.2d 364 (D.C. 1983).

The Board established criteria for determining whether a particular stretch of track is a railroad line or an exempt industrial/switching track. Those factors are:

1. The use to which the track has been put.
2. The amount of traffic over the line.
3. Whether there was regularly scheduled service.
4. The number of shippers on the track.
5. Whether there are stations on the line.
6. Whether the line was constructed of light rail.
7. The length of the track.

See "Spur, Industrial, Team, Switching or Side Track Exemption", Surface Transportation Board, Office of Public Assistance, February, 1996.

Applying the Board's factors to this case, we find:

1. The Board found in its decision that the trackage was entirely private switching/industrial track, "beyond the Board's jurisdiction".
2. ISW records disclose that in all of calendar 2002, the sole shipper at the OVR portion of Harwood Yard shipped a grand total of 8 freight cars (all empties), 2 passenger cars, and 2 locomotives. All of these moves were equipment moving on their own wheels. None were common carrier moves. In calendar 2003, there were a total of

23 moves, only two (scrap loads) appeared to be common carrier loads. In the first four months of 2004, there were 14 moves, one of which was a load.

3. There is no regularly scheduled service.
4. OVR admits there is only one shipper.
5. There are no stations on the line.
6. The construction of the tracks is not in the record.
7. OVR alleges they have 2.8 miles of trackage, but that is a total of all yard tracks, not a linear mileage. They have not provided any mileposts (because there are none), so one can only conjecture from OVR's deed (Exhibit C to OVR's Reply of May 3, 2004) that the longest track is less than 1,500 feet.

The Seventh Circuit in Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Chicago & Eastern Illinois R.R. Co., 198 F.2d 8 (7th. Cir. 1952), laid out some additional factors to consider:

1. Whether there is passenger service on the track;
2. Whether there is express or mail service provided;
3. Whether there are stations, agents, or holding platforms on the line;
4. Whether there is telephone or telegraph service provided;
5. Whether the track is primarily used to serve industrial use, such as factories, warehouses, etc.;
6. Whether the track is used to service industry in an area or is an extension of the railroad line to reach new areas; and
7. Whether the shipments on the track are one-way. .

While the references to passenger and mail service may be antiquated, Harwood Yard fails all seven of the Court's considerations.

The Board's conclusion that ISW has the burden of proving an improper purpose for the transaction both ignores the statutory language of §10906, and is inconsistent with the Board's decision in Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA, Finance Docket No. 34252 (Served December 5, 2002). The Board clearly stated in Yolo County that, in order to change the legal status of trackage, the proposed carrier has the burden of demonstrating that the trackage has acquired the required indicia of regulated common carrier trackage. OVR has demonstrably failed to make any such demonstration.

OVR's claim that it becoming a railroad will "permit renewed common carrier rail services at Harwood Yard" is simply false. There is no evidence that ISW failed to provide service to Mid-America, the sole customer. The portion of the former Harwood Yard that OVR claims to have leased is not and never has been a line of railroad.

If OVR can convert its portion of Harwood Yard into a railroad, then the owner (or, as in this case, lessee) of any spur, industrial, team, switching or side track in the country could, on a whim, file a Notice of Exemption and become a common carrier railroad. That would render §10906 meaningless. Nor is such a result consistent with either the National Transportation Policy or the public interest.

CONCLUSION

ISW respectfully requests that the Board reconsider its decision denying the Petition to Reject or Revoke. This Notice of Exemption is the sort of abuse of the Board's process that the Board has repeatedly refused to condone. Permitting the conversion of exempt trackage into a "railroad line" just because a lessee wants to be a railroad would open the sort of Pandora's box which §10906 sought to keep closed.

Respectfully submitted,



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VERIFICATION

I, Daniel A. LaKemper, General Counsel of Indiana Southwestern Railway Co., verify under penalty of perjury that I have read the above and foregoing Motion to Reconsider Petition to Reject or Revoke; that I have knowledge of the facts stated therein; and that those facts are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file the foregoing document.



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served by sending it via UPS Next Day Air courier service, all charges paid, this 25th. Day of October, 2004, to the following:

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