

(c)(4)



WRITER'S DIRECT DIAL NUMBER



June 28, 2002

By e-Mail (Original by U.S. Mail)

Nancy M. Ovuka, ~~Esquire~~
Federal Trade Commission
Premerger Notification Office
Room H-301
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Ms. Ovuka:

The purpose of this letter is to confirm in writing my understanding of the conclusions we reached during our various telephone conferences and voice messages on June 25 and 26, 2002, regarding a rail carrier acquisition. Pursuant to those conversations you concluded that, based on the facts and analysis set forth below, the transaction is exempt under 15 U.S.C. 18a(c)(6) from the pre-merger notification and filing requirements. I would greatly appreciate it and hereby request that you contact me at [redacted] acknowledge receipt of this letter and confirm that I have correctly stated the Commission's position on this matter.

FACTS

Company A is an indirect non-carrier subsidiary of Company B, which is a rail carrier. Company C is a wholly-owned subsidiary of Company B and presently holds all the stock of Company A. Company A intends to acquire assets from Company Z, which is also a rail carrier. Company A is a newly-formed company with no assets. The value of the assets being acquired from Company Z has been determined to be less than \$200 million dollars.

The acquisition will be made in two steps. In the first step, Company A files with the Surface Transportation Board (the "Board") a notice of exemption pursuant to 49 C.F.R. § 1150.35, *et seq.* to acquire and operate the rail carrier assets of Company Z. The exemption generally becomes effective 21 days after filing of the notice. Once the exemption is effective and immediately prior to the consummation of the acquisition, Company A's stock will be placed into an independent, irrevocable voting trust (the "Voting Trust"). In the second step,

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Company B and Company C will then apply to the Board for permission to control Company A. If the Board grants the application, the Voting Trust will be terminated and the stock of Company A will be transferred back to Company C. If the application is not granted, the trust stock is to be sold to a person not affiliated with Company B or Company C.

LAW

Exemptions to the notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a, are contained in subsection (c). Subsection (c) provides, in pertinent part, as follows:

The following classes of transactions are exempt from the requirements of this section –

* * *

(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General.

Rail carrier acquisitions are subject to the exclusive jurisdiction of the Surface Transportation Board (the "Board"). 49 U.S.C. § 11321(a) provides, in pertinent part, as follows:

The authority of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws [Emphasis added.]

The Board, formerly the Interstate Commerce Commission, permits rail carrier acquisitions to be accomplished through the two-step process in this transaction as outlined above. In this regard, in *Water Transport Ass'n v. I.C.C.*, the Court of Appeals for the District of Columbia Circuit stated as follows:

merging carriers often have an economic incentive to complete the transaction first and seek ICC approval later. The ICC has long permitted carriers to do this by use of an independent voting trust.

If the acquiring carriers put the stock of the acquired carriers in an independent voting trust, the ICC holds that the transaction does not violate § 11,343 [now 49 U.S.C. § 11323] because the acquiring carrier does not "control" the acquired carrier. See Voting Trust Rules, 49 C.F.R. § 1013 (1982). This construction of § 11,343 has been upheld by the courts and is not in dispute here.

Water Transport Ass'n, 715 F.2d 581, 582 (D.C. Cir. 1983) (footnote omitted; editorial comment supplied).

Section 11323 of the Interstate Commerce Act, 49 U.S.C. § 11323, prohibits the "[a]cquisition of control of a rail carrier by any number of rail carriers" without Board approval. The Board approval standards include consideration of the acquisition's effect on competition. 49 U.S.C. § 11324 (b)(5) and (d).

ANALYSIS

Based on our discussions, the ~~Commission~~ *Premerger Office* will view this transaction as exempt under subsection (c)(6) as a transaction "specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General." 15 U.S.C. 18a(c)(6). The Board has exclusive jurisdiction over the transaction, and exemption or approval of the transaction by the Board provides the parties to the transaction with an exemption to the antitrust laws.

The first step of the transaction, which results in the formation of the Voting Trust and the acquisition of assets of Company Z, does not permit Company B or Company C to exercise of control over the Company A assets, as defined by the Board. The ~~Commission's~~ *Premerger Office's* view is that this in an intermediate step in a transaction that is exempt under subsection (c)(6). No notification or filing is required for this intermediate step in the transaction.

Alternatively, the ~~Commission~~ *Premerger Office* could take the view that the Voting Trust is the ultimate person entity and that no filing is required for the first, intermediate step because it does not meet the size of person test and because the value of the assets being acquired is less than \$200 million.

Because the second step of the transaction is viewed as the main transaction, which is exempt under subsection (c)(6), copies of all information and documentary material filed with the Board in connection with any application for control filed by Company B or Company C will be filed contemporaneously with the Commission and the Assistant Attorney General. This submission is also required under the Board regulations. 49 C.F.R. § 1180.4(c)(5)(iii) and (iv). Accordingly, the ~~Commission~~ *Premerger Office* will review the transaction when the information and material required under subsection (c)(6) are filed. It is understood that the filing of this information and

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material is not viewed as a premerger notification and report filing such that it triggers the statutory waiting period or requires payment of a filing fee.

Based on our conversations, we may rely on the telephone conversations and this letter in our determination as to the lack of the necessity to submit a pre-notification filing. In the event that a determination is subsequently made that a filing was required, this letter will preclude the assessment of any penalties for failure to comply with the Act's notification requirements

CONCLUSION

The transaction is exempt under subsection (c)(6). The simultaneous formation of the Voting Trust and initial acquisition does not require any filing under the HSR Act because it is an intermediate step in the exempt transaction. In seeking approval of the transaction by filing an application for control with the Board, all information and material filed with the Board must be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General. Therefore, aside from the material and information required under subsection (c)(6), there is no pre-merger notification filing requirement for the above-described transaction.

Very truly yours,



7/1
Advised writer by
phone that I agree
w/ the advice. It
is the view of the
Premerger Notification
Office that the
transaction is
exempt under (c)(6).

nmo
MV concurs