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September 28, 2021

VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: **FD 36489**
Savannah Industrial Transportation, LLC – Operation Exemption –
Effingham County, GA

Verified Response of Savannah Industrial Transportation, LLC, OmniTRAX Holdings Combined, Inc., and OmniTRAX, Inc., to the Surface Transportation Board Order of September 14, 2021

Dear Ms. Brown:

Pursuant to the order of the Surface Transportation Board (“Board”) served in this docket on September 14, 2021 (the “September 14 Order”), Savannah Industrial Transportation, LLC (“SIT”) and OmniTRAX (as defined below) hereby provide additional information regarding the private switching facility (“Facility”) in which SIT operates at Rincon, Georgia.

In its September 14 Order, the Board sought clarification from SIT and OmniTRAX¹ concerning whether the Facility that is the subject of the individual petition for exemption in the present proceeding (the “Petition”) “is the same (or substantially similar) rail line for which [Savannah Industrial Railway, LLC – “SIR”] sought and received a waiver in 2018” as part of a proceeding under which SIR had, at that time, considered seeking Board authority to construct and operate a new line of railroad. The Board also directed OmniTRAX

¹ By its use of the term “OmniTRAX” the Board has explained that it meant the term to apply to “both OmniTRAX, Inc., and OmniTRAX Holdings Combined, Inc., if these are separate entities.” September 14 Order, 2, n. 8. OmniTRAX, Inc., and OmniTRAX Holdings Combined, Inc. are separate entities, and so the present filing is filed on behalf of both, along with SIT.

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and SIT to “submit any relevant documentation about the rail properties (including on uses and operations) and explain why they did not seek construction authority” from the Board, if the Facility is the same as the proposed railroad line that was the subject of FD 36192.²

A portion of the “Track” (as that term is used in the September 14 Order) that was the subject of the environmental filings in FD 36192 – as is generally described in SIR’s July 3, 2018 waiver request to the STB’s Office of Environmental Analysis (“OEA”), and, in turn, in OEA’s letter of July 9, 2018 (granting the requested waiver) – is substantially similar to the track that Savannah Industrial Logistics, LLC (“SIL”) later constructed within the Facility and over which SIT seeks authorization to conduct common carrier operations under the subject Petition. However, SIL has not constructed a significant portion of the Track configuration presented to the Board staff in 2018, and that additional track may never be constructed or may be substantially reconfigured depending on the development of, and rail needs within, the industrial park containing the Facility. As explained herein – (a) OmniTRAX’s current working team was unaware of the 2018 meeting and filings to OEA; (b) current OmniTRAX leadership was unaware of the 2018 dialogue with OEA (and the related environmental filing made on behalf of SIR); and (c) SIT, under an arrangement with SIL,³ leases and operates the subject trackage in its capacity as a contract (private) carrier.

As reflected in the record, the Facility is located northwest of the Port of Savannah, Georgia. Today, both CSX Transportation, Inc. (“CSXT”), and Norfolk Southern Railway Company (“NSR”) access customers within the Facility via SIT’s contract switching services. SIL completed construction of the Facility in the latter half of 2020. SIT leases the Facility trackage from SIL, and provides private switching services over it today to a single customer currently located within the Facility. SIT had intended to remain a private switching provider, but this changed for the reasons set forth in the Petition.

As further clarified below, given the discovery of the 2018 interaction with Board staff and the similarity of the “Hub” (as defined in the 2018 communications) to what ultimately

² September 14 Order, 2.

³ A redacted version of the “Track Lease Agreement” (the “Agreement”) between SIL and SIT, effective as of November 9, 2020, was provided as Exhibit B to the Petition. That Agreement neither expressly permits nor forbids SIT from engaging in common carrier operations on Facility trackage. But, upon further review, Section 4.1 of the Agreement would purport to bar SIT from handling certain commodities (under a “table” that has not been developed to date), which restriction is consistent with, and allowable under, a private switching arrangement as now exists, but which would need to be removed if SIT were in the future to commence common carrier service over the Facility trackage as such limitations would not be allowed.

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became the Facility, the Petition is unintentionally inaccurate in one respect. Specifically, the notion conveyed in SIT's Petition that OmniTRAX had only planned to construct and operate the trackage within the facility as private switching trackage⁴ is incorrect, even though OmniTRAX's current team thought that to be true when the Petition was filed. In fact, OmniTRAX had considered two alternative approaches— one involving the construction and operation of a railroad line subject to the Board's jurisdiction, as was discussed with Board staff in 2018, and the other contemplating constructing and operating the trackage as part of a private (contract-only) switching facility outside of the scope of Board's jurisdiction.

The information disclosed in the Board's September 14 Order regarding SIR's and OmniTRAX's prior outreach to Board staff (and the preliminary steps toward a railroad line construction application that was never filed) came as a great surprise to the undersigned counsel and to OmniTRAX officials who had retained present counsel to prepare and file the Petition. None of the OmniTRAX officials attending the meeting with Board staff in January of 2018 on behalf of SIR were involved in the development of the Petition. In fact, with the exception of Ken Rose, all of those listed as having attended that meeting⁵ – including OmniTRAX's then general counsel – are no longer employed by OmniTRAX.⁶ That is, until the September 14 Order, the OmniTRAX personnel engaged in assisting with the preparation of the Petition and its

⁴ September 14 Order, 1-2 (“According to the Petition, the Track was constructed without Board authority because, during the planning and construction of the Facility and the Track, SIT and SIL anticipated that SIT would function as a private switching carrier within the Facility.”) (footnote omitted).

⁵ See internal OmniTRAX email (dated January 21, 2018) consisting of minutes from the January 19 meeting with STB Staff, attached as Exhibit A (and for which OmniTRAX waives privilege).

⁶ In the larger message of the Petition, the verified statement of Mr. Peter A. Touesnard can be seen as incorrectly suggesting that OmniTRAX never contemplated common carrier operations within the Facility, when, in fact, OmniTRAX admittedly *had* considered, and had acted on, such an approach through SIR. At the same time, however, Mr. Touesnard was not involved with, and was not aware of, the 2018 consultation with the Board staff or the related SIR waiver request, and his testimony addresses the plans and objectives of SIT and SIL, *not* SIR, which neither constructed the Facility nor was designated to operate it. Thus, his testimony, while uninformed as to OmniTRAX's 2018 plans, is correct with respect to SIT, which OmniTRAX intended from the outset to provide private switching operations within the Facility (and has functioned since as a private switching service provider), and also with respect to SIL, which (instead of SIR) constructed the Facility trackage as private track subject to all applicable state and local oversight. The reasons that Mr. Touesnard has given for SIT's original preference to be a non-carrier, and its new preference to be a common carrier are still correct.

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current regulatory counsel were unaware of SIR's and OmniTRAX's 2018 outreach to Board staff and the related SIR waiver request. But a careful exploration of OmniTRAX's voluminous records likely could have revealed the SIR/OmniTRAX consultations with Board staff, along with the waiver filing (and OEA's grant of the same). If this information had been known by the current team it would have altered SIT's approach to obtaining authorization to provide common carrier service within the Facility.

The September 14 Order, of course, prompted OmniTRAX to investigate its records related to the development and operation of the Facility. Those records consistently involve privileged communications among officials then employed by OmniTRAX or its affiliates, OmniTRAX's general counsel at the time, and OmniTRAX's outside regulatory counsel at the time. They reveal the following:

- The concept for development of what became the Facility appears to have emerged in 2017. At that time, OmniTRAX and its legal counsel engaged in considerable analysis and discussion about the relative advantages and disadvantages of constructing and operating the track within the Facility either as part of a federally-regulated common carrier operation, or as a non-federally-regulated private switching operation.⁷
- In 2018, the aforementioned internal strategic dialogue (concerning the potential jurisdictional status of the Hub rail operations) continued. Those records also indicate that, although OmniTRAX initiated steps before the Board consistent with a construction proceeding, SIR had taken such steps as a matter of expedience, and in the interest of timing, and that OmniTRAX had not committed definitively to a common carrier operation at the Hub (or, by extension, the Facility). Contemporaneous communications examined since the September 14 Order, in fact, reflect no definitive commitment to a common carrier path.
- In 2019, when A&R Logistics approached OmniTRAX to construct a rail-served building at the Facility, OmniTRAX concluded that the Facility trackage should be built and operated as a private switching enterprise. In turn, SIL was established to construct the Facility, and to arrange terms for SIT private carriage under the Agreement on that basis.
- SIL completed construction of the Facility and appurtenant trackage in the latter half of 2020, and SIT operations commenced on or about October 30, 2020. To date, SIT has

⁷ See redacted memorandum of Andy Engeman (then OmniTRAX general counsel) dated October 17, 2017, attached as Exhibit B (privilege invoked as to redacted portions of that document).

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served, and continues to serve, only one industry located within the Facility – A&R Logistics.

In short, changes in OmniTRAX staff, a change in counsel, and an inadequate records review, and not some purposeful attempt to mislead, lies at the heart of the Petition’s inaccuracy about the background of the decision to build and operate the Facility trackage for purposes of private switching, rather than common carriage.

Once the decision was made for SIT to undertake operations as a private switching carrier, SIT since has operated as such. For example:

- SIT receives payment for the movement of freight within the Facility not from the customers paying the line-haul movement, but rather from NSR and CSXT pursuant to agreements⁸ with those carriers that refer to the payments as a “switching allowance” and as a “switching refund,” respectively. In addition, SIT is not referred to as a common carrier or a connecting railroad, but rather as an “Industry” in the CSXT contract, and as a “Customer” in the NSR agreement.
- Under the terms of both of the aforementioned agreements, SIT may be liable to NSR and CSXT for demurrage, as would a railroad customer, or as an intermediary, third-party recipient of freight cars supplied by the originating or terminating carrier.
- SIT has no interchange agreement with either NSR or CSXT.
- SIT does not appear in waybills as a connecting linehaul carrier of freight into and out of the Facility, or in any other capacity consistent with having a rail common carrier status.
- SIT has not issued any tariffs, and it has no authority to do so.

⁸ Each of the aforementioned agreements contains strict confidentiality provisions. SIT and OmniTRAX are mindful of the Board’s request for “relevant documentation about the rail properties (including on uses and operations),” and are willing to provide copies of these agreements in keeping with that request, but, given the short time frame for this response, SIT has not been able to confer with CSXT and NSR to obtain the consent of each to disclosure of the agreements, or, for that matter, to ascertain the appropriate redactions necessary to publicly disclose the balance of the terms of those agreements. If the Board so instructs, then SIT will arrange to work with NSR and CSXT to produce each agreement.

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- SIT is not a registered railroad with the Association of American Railroads, has no railroad reporting marks registered in its name, and does not participate in payments through Railinc's "Interline Settlement System."
- SIT has not claimed the Federal "45G" tax credit, designed to offset track maintenance expenses for smaller common carrier railroads.

SIT and OmniTRAX acknowledge their error and reemphasize it was regrettable yet unintentional. Having re-examined its circumstances in light of the posture of this proceeding, SIT still seeks to become a Board-authorized rail common carrier, whether through the present Petition or via a different proceeding. OmniTRAX and SIT further appeal to the Board to provide guidance on how best to accomplish SIT's objectives, a step which truly is in the best interest of SIT's current and future customers.

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish

Thomas J. Healey

Attorneys for, OmniTRAX Holdings Combined, Inc.,

OmniTRAX, Inc., and Savannah Industrial

Transportation, LLC

RAW/rw

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36489

SAVANNAH INDUSTRIAL TRANSPORTATION, LLC
– OPERATION EXEMPTION –
IN EFFINGHAM COUNTY, GEORGIA

**PETITION FOR EXEMPTION
PURSUANT TO 49 U.S.C. § 10502(a)**

**RESPONSE TO THE BOARD’S SEPTEMBER 14, 2021
REQUEST FOR ADDITIONAL INFORMATION**

EXHIBIT A

**INTERNAL REPORT/MINUTES FROM JANUARY 19, 2018
MEETING WITH STB STAFF (DATED JANUARY 21, 2021) –
REDACTED TO PROTECT PRIVILEGED COMMUNICATIONS**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]

From: Ken Rose <krose@omnitrax.com>

Sent: Sunday, January 21, 2018 1:15 PM

To: Andy Engeman <AEngeman@omnitrax.com>; Reagan Shanley <rshanley@omnitrax.com>; Mike Martin <mmartin@omnitrax.com>

Cc: Ken Rose <krose@omnitrax.com>

Subject: Minutes from the STB meeting re: Savannah 1/19/2018

STB Meeting to discuss Savannah Gateway Industrial Railroad - 1/19/2018
STB office 395 E Street, SW. Room 1101, Washington D.C. 20423

Attendees:

Ken Blodgett – STB project manager, 202 245-0305

Vicky Rutson – STB Chief, 202 245-0295

Katherine Bourdon – STB Attorney
Reagan Stanley - OmniTRAX
Andy Engeman - OmniTRAX
Mike Martin – OmniTRAX
Ken Rose - OmniTRAX
Karl Morrell - outside Counsel for OmniTRAX

List of environmental and engineering reports completed by Effingham County (2004 to 2015):

- Phase 1 Cultural Resources Survey June 4, 2004
- Habitat Assessment for Threatened and Endangered Species 2011
- Preliminary Jurisdictional Determinations for wetlands (USACE, 2/2015)
- Phase 1 Environmental Site Assessment (ESA, 9/2011)
- Phase 1 Traffic Impact Study 10/2010
- Development of Regional Impact Findings Report, (Coastal Regional Commission of GA, 7/2012)
- Sewer and Reuse Water Master Plan, (HGB, 10/2006)
- Preliminary Geotechnical Report (Terracon, 6/2011)
- FEMA Flood Zones map (no date)
- Approved Concept Report for Effingham Parkway Expansion (GDOT, 11/2014)

Meeting minutes 1/19/2018 10:00 to 11:15

1. Phase 1 of the Savannah Gateway Industrial Park (SGIP) is planned for construction between the CSX and NS track.
[REDACTED]
3. Briefly reference Green Growth Guidelines, for the least deleterious effect on the site's Environmentally Sensitive Areas
4. Initial customers will likely be smaller. If a large customer is landed, it will likely be in Phase 2. Referenced available area in respect to an existing Mercedes Benz plant.
5. Q: Are there any tenants yet. A: No
6. Dependent upon user what the final track configuration will be.
7. Discuss impact on existing elementary school. Plans for the school is to relocate, and possibly repurpose the school. Elementary school.
8. Q: How many kids go to the elementary school? A: Don't know. TBD
9. Ken Rose references the track design is the 10% design stage, based in part on the locations of the turnouts on the CSX track.
10. Discuss the role of the OmniTRAX Class 1 relations team.
11. Q: How big is the yard? A: Smallest yard planned is 3 tracks.
[REDACTED]
13. Q: How many miles of track? A: Unsure, can provide, based on the current engineering design, and is subject to change.
14. Auto corridor in the southern part of the property. Rail is located to the north.
15. Smaller users on the east side. The mega user would fix in the center larger portion.
16. Mike discussed an endorsement that the state issued recently.
[REDACTED]
18. "Good step forward having USACE, and that there is a foundation to start with."
19. Savannah is the 4th largest port in the U.S. The birth is over 2 miles wide. The Savannah port is the fastest growing in the nation.
[REDACTED]
21. At some point we will need to document the purpose and need of the development.
[REDACTED]

[REDACTED]

24. To conduct an environmental review, STB will need to know the number of trains and rail car projections. STB will need to see the business plan for the volume of train movement. The volume of train traffic will affect the environmental NEPA results.

[REDACTED]

26. Discuss file for a 6-month waver.

27. Is it okay to bid out the NEPA work that will be completed under the STB direct supervision? Yes

28. STB has a process, where there are monthly project the calls to track NEPA project. Budget projections. Progress.

[REDACTED]

30. Don't select a contractor who has already done work for OmniTRAX.

31. STB has some new contractors that are doing very well.

32. Most of the new STB cases are in the GA area. There is a lot going on there right now.

[REDACTED]

35. Most of the property adjacent is zoned agricultural.

36. Q: Is there any land onsite currently that's zoned "Industrial"? A: No

37. Effingham Parkway is dedicated to truck traffic, construction completed in 2021. "Just one of many things to considered." "Forward thinking from GA DOT."

[REDACTED]

39. Vicky gives summary of the construction case process,

[REDACTED]

42. Ken Rose is the point person with STB for the NEPA investigation and reporting.

43. STB wants forecasts for 5 to 10 years for rail traffic.

[REDACTED]

45. One of the STB's most important item is to involve and engage the public. Complete transparency.

46. STB wants to make this an example of efficiency and pro-business cooperation. There are not many new railroad projects currently on-going.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36489

SAVANNAH INDUSTRIAL TRANSPORTATION, LLC
– OPERATION EXEMPTION –
IN EFFINGHAM COUNTY, GEORGIA

**PETITION FOR EXEMPTION
PURSUANT TO 49 U.S.C. § 10502(a)**

**RESPONSE TO THE BOARD'S SEPTEMBER 14, 2021
REQUEST FOR ADDITIONAL INFORMATION**

EXHIBIT B

**LEGAL MEMORANDUM DATED OCTOBER 17, 2017
(REGARDING OPTIONS FOR DEVELOPMENT AND
OPERATION OF SAVANNAH FACILITY) – REDACTED TO
PROTECT PRIVILEGED COMMUNICATIONS**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[illegible]

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36489

SAVANNAH INDUSTRIAL TRANSPORTATION, LLC
– OPERATION EXEMPTION –
IN EFFINGHAM COUNTY, GEORGIA

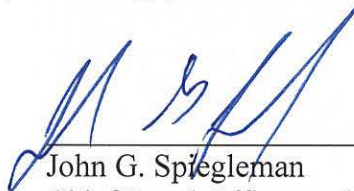
**PETITION FOR EXEMPTION
PURSUANT TO 49 U.S.C. § 10502(a)**

**RESPONSE TO THE BOARD'S SEPTEMBER 14, 2021
REQUEST FOR ADDITIONAL INFORMATION**

VERIFICATIONS

VERIFICATION

I, John G. Spiegleman, hereby verify under penalty of perjury that I am Chief Legal Officer and General Counsel for OmniTRAX Holdings Combined, Inc., and OmniTRAX, Inc. (collectively, "OmniTRAX"), and that I am authorized to offer this verification on behalf of OmniTRAX. Specifically, I have knowledge of the matters contained in the foregoing filing as they pertain to OmniTRAX's records review in response to the September 14 Order (as that term is defined in the foregoing filing), and verify that the statements made in the foregoing filing with respect to OmniTRAX's records review and the results of the same as discussed in this filing are true and correct to the best of my knowledge, information and belief.

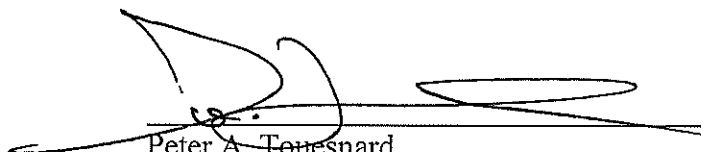


John G. Spiegleman
Chief Legal Officer and General Counsel for
OmniTRAX Holdings Combined, Inc., and
OmniTRAX, Inc.

Dated: September 27, 2021

VERIFICATION

I, Peter A. Touesnard, hereby verify under penalty of perjury that I am Chief Commercial Officer for OmniTRAX, Inc. ("OmniTRAX"), and that I am authorized to offer this verification on behalf of OmniTRAX. Specifically, I have knowledge of the matters discussed in the foregoing filing as they pertain to SIL's plans to construct the track that is the subject of the present Petition, SIT's operation of that track, the circumstances behind SIL's decision to build the track as private switching track, and SIT's arrangements to provide private switching over it. I also verify, in keeping with the foregoing filing, that I had no knowledge of OmniTRAX's communications with STB staff in 2018 regarding the potential development of the Facility (as that term is defined in the filing) at the time the subject Petition was filed, and further verify that the statements made in the foregoing filing with respect to my knowledge of SIL's and SIT's plans for the trackage within the Facility and my corresponding lack of knowledge of any 2018 discussions with STB staff (or related filings) involving Savannah Industrial Railway, LLC (an entity which I do not recall having heard of until on or after September 14, 2021) are true and correct to the best of my knowledge, information and belief.



Peter A. Touesnard
EVP Special Projects for OmniTRAX, Inc.

Dated: September 27, 2021