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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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November 21, 2017
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Finance Docket No. 36152

**OHIO RIVER PARTNERS SHAREHOLDER LLC – EXEMPTION FOR INTRA-
CORPORATE FAMILY TRANSACTION – OHIO RIVER PARTNERS, LLC**

Finance Docket No. 35984

**OHIO RIVER PARTNERS LLC – EXEMPTION FOR ACQUISITION AND
OPERATION OF A RAIL LINE – HANNIBAL DEVELOPMENT, LLC IN
MONROE COUNTY, OHIO**

**OHIO RIVER PARTNERS SHAREHOLDER LLC REPLY TO
PETITION FOR PARTIAL REVOCATION FOR IMPOSITION OF
CONDITIONS AND FOR CLARIFICATION**

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Dated: November 21, 2017

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Pursuant to the Decision served in the above-captioned proceedings on November 13, 2017 (the “*Abeyance Decision*”), Ohio River Partners Shareholder LLC (“ORPS”) and Ohio River Partners LLC (“ORP”) submit this Reply to the Petition of Ohio Terminal Railway Company (“OTRC”) For Partial Revocation For Imposition Of Conditions And For Clarification, filed on November 2, 2017 (the “OTRC Revocation Petition”). For the reasons set forth hereinafter, the OTRC Revocation Petition should be denied.

I. OTRC HAS NOT SATISFIED THE STANDARD FOR REVOCATION OF THE CLASS EXEMPTION IN FINANCE DOCKET NO. 36152.

The standard for seeking revocation of a class exemption is well-established. Revocation is appropriate only where the Board finds that regulation of the subject transaction is needed to

carry out the rail transportation policy. *See, e.g., Tulare Valley R.R. Co. – Abandonment and Discontinuance Exemption – in Tulare and Fresno Counties, CA*, ICC Docket No. AB-397 (Sub-No. 3X) at 3 (served Dec. 1, 1995), *citing Wisconsin Central Ltd. – Exemp. Acq. & Oper. – Certain Lines of Soo L.R. Co.*, ICC Fin. Docket No. 31102 at 15, n. 17 (served July 28, 1988).

“The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted.”

Id. The OTRC Revocation Petition fails to satisfy this standard, and should be denied.

OTRC does not contend – much less demonstrate – that formal regulation of the intra-family merger between ORP and its immediate parent, ORPS, is necessary to carry out any element of the rail transportation policy. To the contrary, OTRC states that “[it] does not oppose the proposed intra-corporate family transaction.” OTRC Revocation Petition at 2. Nevertheless, OTRC argues that the Board should “partially” revoke the exemption for the purpose of “impos[ing] on ORPS the conditions imposed on ORP’s operating rights” in the Board’s April 1, 2016 Decision in Finance Docket No. 35984 (the “*Exemption Decision*”). *Id.*¹ Specifically, OTRC requests that the Board “make[] clear that ORPS, as the successor to ORP, will have only the conditional operating authority that ORP obtained” in the *Exemption Decision*. *Id.* at 3.

Revocation of the corporate family transaction exemption is not necessary to make the terms and conditions of the *Exemption Decision* applicable to ORPS. The Agreement of Merger provides that “ORP LLC shall merge with and into ORPS LLC, with ORPS LLC being the surviving limited liability company.”² Immediately upon consummation of the merger, the separate corporate existence of ORP will cease, and ORPS, as the surviving company, will as a

¹ *See Ohio River Partners LLC – Acquisition and Operation Exemption – Hannibal Development, LLC*, STB Docket No. FD 35984 (served April 1, 2016).

² *See* Notice of Exemption filed October 16, 2017, Exhibit B, Agreement of Merger § 1(a).

matter of law succeed to all the “rights, privileges and powers” of ORP, as well as all of ORP’s “debts, liabilities and duties.” *See* 2 DE Code § 18-209 (2014). Among other things, ORPS will, as a matter of law, step into the shoes of ORP under the *Exemption Decision* and therefore will be bound by the terms and conditions set forth in that decision.

OTRC vaguely asserts that ORP and ORPS “may be using the intra-corporate family transaction to avoid the conditions established in the ORP Authorization proceeding.” OTRC Revocation Petition at 3. That assertion is nonsense. As explained in the Notice of Exemption, the rail line acquisition that was the subject of the *Exemption Decision* was part of a broader real estate transaction pursuant to which ORPS acquired certain industrial property (including the land upon which the Omal Line is located) from Hannibal Development LLC. At the time of the *Exemption Decision* in early 2016, the parties envisioned that ORP would acquire and operate the Omal Line and ORPS would acquire title to the other real property. However, as the transaction was finally consummated on June 16, 2017, title to all of the property, including the Omal Line, was conveyed to ORPS. The purpose of the corporate family transaction at issue here is to consolidate both fee title to, and the right to operate, the Omal Line in the same corporate entity by merging ORP into its parent, ORPS. Neither ORP nor ORPS has any intention to operate the Omal Line in violation of the *Exemption Decision* – to the contrary, they understand that ORPS, as ORP’s corporate successor, will be bound as a matter of law by the terms and conditions of the *Exemption Decision*.³ In order to eliminate doubt with respect to

³ OTRC also suggests that Fortress should file an additional notice of exemption to continue in control of ORPS upon consummation of the ORP/ORPS merger. OTRC Revocation Petition at 3, n. 1. As noted in the *Abeyance Decision* (at 1, n. 1), continuance in control of ORP was authorized in Finance Docket No. 35985, *Fortress Investment Group LLC – Continuance in Control – Ohio River Partners LLC*, (STB served December 31, 2015). The current transaction would simplify Fortress’ corporate structure by merging ORP into the intermediate company (ORPS) through which Fortress’ affiliate, Fortress Transportation and Infrastructure Investors

ORPS' intentions, ORPS hereby adopts and reaffirms the commitment previously made by ORP that it will not commence rail operations over the Omal Line until appropriate interchange and operating protocols are established with OTRC and NS, as required by the *Exemption Decision*.⁴

II. THE EXEMPTION DECISION DID NOT IMPOSE A CONDITION REQUIRING ORP TO DEMONSTRATE THAT IT POSSESSES A SUFFICIENT PROPERTY INTEREST TO OPERATE OVER THE OMAL LINE.

The OTRC Revocation Petition also requests "clarification" of what OTRC characterizes as "open issues" relating to the "conditions" imposed by the Board in the *Exemption Decision*. According to OTRC, "[o]ne of the conditions was the acquisition of a property interest in the Omal Line." OTRC Revocation Petition at 5. OTRC's assertion that the *Exemption Decision* imposed such a "condition" on ORP is incorrect.

The *Exemption Decision* did not, as OTRC contends, impose a "condition" on the exemption requiring ORP to demonstrate that it has a state property interest in the Omal Line, nor did the Board otherwise indicate that its regulatory authorization of the transaction would not be effective until ORP had made such a showing. To the contrary, the ordering paragraph of the *Exemption Decision* very explicitly imposed on ORP a single condition:

Before ORP may commence any operations on the Line, NSR, ORP and OTRC must negotiate and agree on interchange and operating protocols, and jointly certify to the Board that these protocols are in place. *Exemption Decision* at 4.

As discussed below, and in ORPS's Reply to OTRC's Petition for Deferment of Rail Operations,

LLC ("FTAI") exercises control of ORP. The Board's class exemption at 49 C.F.R. §1180.2(d)(3) is intended to facilitate such corporate reorganization transactions, which have no competitive or operational impacts. No legitimate regulatory purpose would be served by requiring yet another notice of exemption in connection with the merger of ORP with and into ORPS.

⁴ See Letter dated September 7, 2017 to Cynthia T. Brown from Terence M. Hynes.

ORP has diligently pursued appropriate interchange and operating protocols with OTRC and NS, But, to date, each of its proposals has been rejected by OTRC.⁵

OTRC's claim that the Board imposed a second "condition" upon its regulatory authorization – requiring ORP to demonstrate "a sufficient property interest in the line to operate over it" (OTRC Revocation Petition at 5) – is based upon the following statement in the *Exemption Decision* (at 3):

[T]he Board's grant of authority to operate under a notice of exemption is permissive only, and in order to exercise that authority and commence operations, the carrier must still obtain the necessary rights under state property and/or contract law.

Contrary to OTRC's position, this general statement regarding the "permissive" nature of a class exemption did not constitute a "condition" upon the regulatory authority granted to ORP in the *Exemption Decision*. Rather, it articulated the unremarkable proposition that a class exemption – and, indeed, any STB decision granting licensing authority – provides only the requisite regulatory approval for a transaction, and that a party obtaining such regulatory authority may also be required to resolve other state law or contract issues before it can implement the transaction.

The *Exemption Decision* also repeated the well-established principal that "[w]here, as here, there is a dispute about whether an entity can exercise its operating authority by obtaining the property and/or contractual rights in a line of railroad, the dispute generally should be decided by a court, and not by the Board." *Exemption Decision* at 3. The Board has made similar pronouncements regarding the proper role of the Board and the courts in numerous prior

⁵ See Reply of Ohio River Partners Shareholder LLC to Petition for Deferment of Rail Operations, filed September 22, 2017 ("ORPS Reply to Petition to Defer") at 10-16 and Attachment 1, Verified Statement of Ryan Ratledge; OTRC Petition for Deferment of Rail Operations, filed September 5, 2017 ("OTRC Petition to Defer").

proceedings.⁶ As those decisions make clear, “[t]he question of whether a party (or parties) have regulatory authority to operate over a particular segment of track is different from the question of whether that party (or parties) have the necessary property interest or contractual right under applicable agreements to exercise that authority.” *Lackawanna Cnty., R.R. Auth.—Acquis. Exemption—F&L Realty, Inc.*, STB Docket FD 33905, slip op. at 6 (served Oct. 22, 2001) (“*LCRA Acquisition*”) (emphasis in original). The Board’s role is to evaluate a transaction’s compliance with the applicable statutory standards; resolution of conflicting property or contract claims is a matter for the courts to determine.

More importantly, in none of those prior proceedings did the Board “condition” its regulatory authorization, or otherwise prohibit a party from exercising an exemption, until all state law issues were resolved. For example, in *New Hampshire Central R. Inc. – Lease and Operation Exemption – Line of the New Hampshire Dept. of Transp.*, Fin. Docket No. 35022 (served December 11, 2007), the Board denied a petition to reject or revoke a Notice of Exemption where an existing carrier alleged (as OTRC does here) that it had the exclusive right

⁶ See, e.g., *V&S Railway, LLC – Pet. for Decl. Order – Railroad Operations in Hutchinson, Kan.*, STB Docket No. FD 35459, slip op at 6-7 (served July 12, 2012) (“The Board’s (or the ICC’s) grant of authority is permissive only. To exercise that authority, the carrier must complete the acquisition by obtaining the necessary rights under state property and/or contract law to initiate the proposed rail operations on the line. Where, as here, there is a dispute about whether an entity has exercised its agency authority by acquiring a property interest in a line of railroad, the dispute generally should be decided by a court, applying state law, not the Board.”); *Gen. Ry. d/b/a Iowa N.W. R.R. – Exemption for Acquis. Of R.R. Line – in Osceola & Dickinson Cntys., Iowa.*, STB Docket FD 34867, slip op. at 4 (served June 15, 2007) (noting that state courts are the proper venue for resolving contract and property disputes and that the Board’s grant of authority “is permissive, not mandatory, and is not dispositive of ownership of the Line”); *Indiana Northeastern R.R. Co. – Change in Operators – Branch & St. Joseph Cntys. Rail Users Assoc., Inc., in Branch Cty., Michigan*, STB Docket No. 33760, slip op. at 4 (served Sept. 1, 1999) (“The interpretation of contracts lies within the purview of the courts, not with us. We have consistently held that in exercising our licensing authority we look to compliance with the statutory standards, not to whether the applicant or petitioner will be able to exercise the authority sought.”).

to operate the rail line in question. Likewise, in *LCRA Acquisition*, the Board denied an “emergency petition to reopen, revoke, clarify and condition” a rail line sale exemption by a party claiming to hold the exclusive right to operate over a portion of the rail lines in question. As the Board explained, “[i]n exercising our licensing authority, we look to whether the statutory standards are satisfied, not to whether the applicant or petitioner will be able to exercise the authority sought.” *LCRA Acquisition* at 6. Consistent with these longstanding precedents, the Board should deny OTRC’s request for “deferment” of OPRS’ regulatory authority to operate until OTRC’s lawsuit in Ohio court is completed. OTRC Petition to Defer at 3-4. The Board should “clarify” that ORPS may exercise the operating authority granted by the *Exemption Decision* as soon as (1) the Notice of Exemption for the merger of ORP into OPRS in FD 36152 is effective, and (2) appropriate interchange and operating protocols for the Omal Line are agreed to by the carriers (or, in the absence of agreement, imposed by the Board).⁷

⁷ OTRC’s claim that ORPS should be required to demonstrate that it possesses “a sufficient property interest” in the Omal Line before it can operate over the Line is patently inconsistent with the burden of proof in the pending Ohio litigation. It is undisputed that ORPS acquired fee simple title to the Omal Line on June 16, 2017. Fee simple ownership clearly confers a property interest sufficient to permit ORPS to provide rail service over the Omal Line. *See, e.g., BNSF Ry. Co. – Abandonment Exemption – in Stearns Cty., MN*, STB AB-6 (Sub No. 455X) (served May 11, 2007), 2007 WL 1380046 at *2 n. 3 (noting that “fee simple” title “allows unlimited control over a property”). However, OTRC is seeking a declaratory judgment that its Operating Agreement with Hannibal Real Estate LLC (“HRE”) conferred on OTRC an “exclusive” right to operate that overrides ORPS’ rights as the holder of fee title. That is an issue of state law that the Ohio court must decide. In order to prevail on its claim, OTRC has the burden of proof to demonstrate that its contractual rights are superior to ORPS’ fee simple interest. The (nonexistent) “condition” posited by OTRC in its Revocation Petition represents a transparent attempt by OTRC to reverse the burden of proof with respect to the parties’ respective rights to use the Omal Line.

III. THE BOARD SHOULD REQUIRE OTRC TO AGREE UPON APPROPRIATE INTERCHANGE AND OPERATING PROTOCOLS FOR THE OMAL LINE AND, FAILING AGREEMENT, IMPOSE THE AGREEMENT PROPOSED BY ORPS.

As discussed above, the *Exemption Decision* imposed only one condition on the exercise of ORP's right to operate over the Omal Line – *i.e.*, that, prior to commencing such operations, ORP establish appropriate interchange and operating protocols with OTRC and NS. *Exemption Decision* at 4. The Board encouraged the parties to reach the necessary arrangements voluntarily, but stated that “[i]f there are issues that the parties cannot resolve on their own or other issues arise, any party may ask the Board to facilitate discussions or provide other relief.” *Id.*

As ORPS' Reply to Petition to Defer explained, ORP contacted OTRC to discuss interchange and operating protocols in July 2017, shortly after the acquisition of the Omal Line closed. Over the next two months, ORP presented several alternative proposals to OTRC, including a haulage arrangement pursuant to which ORP would handle both ORP and OTRC cars between the NS interchange point and Omal Yard and an arrangement under which ORP and OTRC would, in alternating months, perform the physical movement of both parties' cars to and from the NS interchange point. ORPS Reply to Petition to Defer at 10-13, V.S. Ratledge at 2-7. OTRC rejected ORP's proposals, and did not present any concrete alternative proposal to ORP. OTRC's words and actions indicated to ORP that OTRC had no intention of entering into interchange and operating protocols until it obtained a judicial ruling regarding its (supposed) exclusive operating rights, or ORP agreed to grant OTRC broader operating rights. *Id.*, V.S. Ratledge at 6. OTRC's request that the Board “defer” the effectiveness of OPRS' operating authority “until such time as the state property ownership interests have been finally resolved under Ohio law and the parties have been able to negotiate the joint operational and interchange

arrangements required by the Board” (OTRC Petition to Defer at 3-4) appears to confirm OTRC’s intentions.

OTRC takes issue with ORPS’ description of the parties’ prior negotiations, and states that “OTRC believes that progress can still be made on a joint operating agreement through negotiations if ORP is willing to discuss the issues raised by OTRC.” OTRC Revocation Petition at 7. OTRC suggests that the Board facilitate further negotiations between the parties “by referring those discussions to mediation under 49 C.F.R. Part 1109.” *Id.* If such mediation is unsuccessful, OTRC states that the Board can “institute a proceeding to reach a reasoned determination regarding the terms and conditions that should govern the dual operations on the Omal Line.” *Id.*

ORPS hereby advises the Board (and OTRC) that it is willing to pursue mediation of appropriate interchange and operating protocols under 49 C.F.R. Part 1109. Given the course of prior negotiations, ORPS does not believe that further discussions between the parties prior to the commencement of mediation are likely to be productive. Therefore, ORPS urges the Board to initiate a mediation for the purpose of establishing appropriate interchange and operating protocols for the Omal Line at the Board’s earliest convenience. If mediation is unsuccessful, the Board should establish an expedited schedule for the filing of comments on the Proposed Operating and Interchange Agreement submitted by ORPS. *See* ORPS Reply to Petition to Defer, Attachment 2.

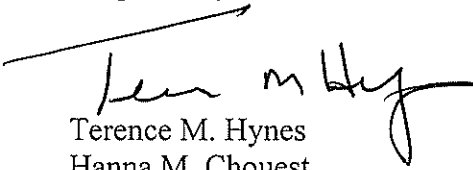
CONCLUSION

More than five months have passed since the real estate transaction pursuant to which ORPS acquired the Omal Line was consummated. The Board's *Exemption Decision* rejected OTRC's prior attempt to prevent ORP from acquiring the Line, and provided that ORP could commence operations as soon as ORP established appropriate interchange and operating protocols with OTRC and NS. Even as it purported to negotiate such arrangements (which, contrary to OTRC's assertions, are not a complicated matter) with ORP, OTRC filed a new lawsuit in Ohio state court on August 29, 2017 seeking a declaratory judgment that OTRC alone possesses the "exclusive" right to provide rail service on the Omal Line. OTRC has pursued a transparent strategy of delay before the Board by filing a petition asking it to "defer" ORP's operations until the newly-filed litigation is completed, and (more recently) a petition for "partial" revocation of the class exemption for an intra-corporate merger that OTRC does not oppose on the merits. These actions belie OTRC's assertion that it is willing to reach a voluntary agreement on interchange and operating protocols that would enable ORPS to commence operations over the Omal Line.

The Board should not countenance the use of its processes to forestall indefinitely a transaction that it has authorized. The Board should deny OTRC's Petition for Partial Revocation in FD 36152. In FD 35984, the Board should promptly initiate a mediation for the purpose of establishing interchange and operating protocols to govern dual operations by OPRS and OTRC over the Omal Line. If the parties cannot reach agreement, the Board should adopt the terms set forth in OPRS' Proposed Operating and Interchange Agreement. Once such protocols are established, ORPS should be permitted to exercise the operating authority granted

in the *Exemption Decision*, unless a court of competent jurisdiction determines that ORPS lacks a state property interest sufficient to permit such operations.

Respectfully submitted,



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Dated: November 21, 2017

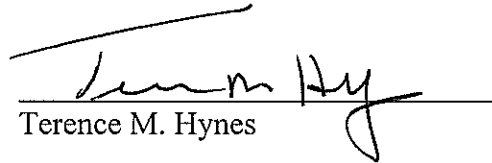
CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Ohio River Partners Shareholder Reply to Petition for Partial Revocation for Imposition of Conditions and For Clarification to be served by first class mail, postage pre-paid, this 21st day of November 2017 on all parties of record, including the following:

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