

BALL JANIK LLP

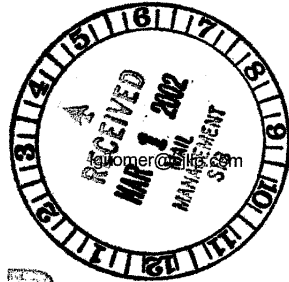
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March 1, 2002

BY HAND

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

MAR 01 2002

**SURFACE
TRANSPORTATION BOARD**

204889 # 010190003

Re: Finance Docket No. 34128, *RailAmerica, Inc.—Control Exemption—New StatesRail Holdings, Inc. and Alabama & Gulf Coast Railway L.L.C.*
Finance Docket No. 34129, *RailAmerica, Inc.—Control Exemption—StatesRail Acquisition Corp. and StatesRail, Inc.*

Dear Secretary Williams:

204890 # 010190004

Enclosed are the original and 10 copies of the Petition to Reopen, a \$300 filing fee for petitioning to reopen two proceedings (49 CFR 1002.2(f)(61)), and a 3.5-inch diskette with the file *Petition to Reopen.doc* in Word format.

Please time and date stamp the extra copy of this letter and pleading and return it to our messenger. Thank you for your assistance. If you have any questions, please call or email me.

Sincerely yours,

Louis E. Gitomer
Attorney for RailAmerica, Inc.

Enclosures

FEE RECEIVED

MAR 06 2002

**SURFACE
TRANSPORTATION BOARD**

**ENTERED
Office of the Secretary**

MAR 06 2002

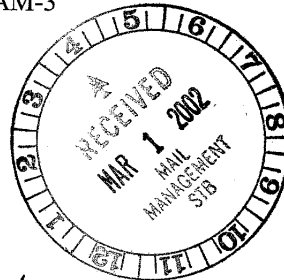
**Part of
Public Record**

PORTLAND, OREGON WASHINGTON, D.C. BEND, OREGON

ORIGINAL

RAAM-3

BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34128

DID# 0101900003

204889

RAILAMERICA, INC.—CONTROL EXEMPTION—NEW STATESRAIL HOLDINGS, INC.
AND ALABAMA & GULF COAST RAILWAY L.L.C.

Finance Docket No. 34129

DID# 0101900004

204890

RAILAMERICA, INC.—CONTROL EXEMPTION—STATESRAIL ACQUISITION CORP.
AND STATESRAIL, INC.

FILED

MAR 01 2002

PETITION TO REOPEN

SURFACE
TRANSPORTATION BOARD

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ENTERED
Dated: March 1, 2002 Office of the Secretary

MAR 06 2002

Part of
Public Record

FEE RECEIVED

MAR 05 2002

SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34128

RAILAMERICA, INC.—CONTROL EXEMPTION—NEW STATESRAIL HOLDINGS, INC.
AND ALABAMA & GULF COAST RAILWAY L.L.C.

Finance Docket No. 34129

RAILAMERICA, INC.—CONTROL EXEMPTION—STATESRAIL ACQUISITION CORP.
AND STATESRAIL, INC.

PETITION TO REOPEN

RailAmerica, Inc. (“RailAmerica”), pursuant to 49 C.F.R. § 1115.4, petitions the Surface Transportation Board (the “Board”) to reopen the decisions in the two above-entitled proceedings to impose the labor protective arrangements explained in *Wisconsin Central Ltd.—Acquisition Exem.—Union Pac. RR.*, 2 S.T.B. 218 (1997) (“*Wisconsin Central*”) in lieu of the *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (“*New York Dock*”) conditions that were imposed on each transaction. RailAmerica contends that changed circumstances and material error warrant reopening.

BACKGROUND

On December 7, 2001, RailAmerica filed two verified notices of exemption.

RailAmerica sought an exemption to control the Alabama & Gulf Coast Railway, L.L.C.

("Alabama & Gulf"), a Class III railroad, to be effective on or after January 1, 2002.¹

RailAmerica also sought an exemption to control StatesRail, Inc. ("StatesRail"), a holding company controlling Arizona Eastern Railway Company, Eastern Alabama Railway, Kyle Railroad Company, San Joaquin Valley Railroad Company, and SWKR Operating Co.

(collectively the "StatesRail Railroads"), all Class III railroads, to be effective on or after January 1, 2002.² At that time, RailAmerica controlled 23 Class III railroads and one Class II railroad.

In the FD 34128 Notice, at page 5, and the FD 34129 Notice, at page 5, RailAmerica indicated that the imposition of the *Wisconsin Central* level of labor protection was appropriate.

Prior to seeking control of Alabama & Gulf and the StatesRail Railroads, on November 29, 2001, RailAmerica had filed a notice of exemption to acquire control of ParkSierra Corp. ("ParkSierra") to be effective on or after January 1, 2002.³ On December 12, 2001, RailAmerica filed a letter with the Board clarifying that ParkSierra was a Class II railroad and that therefore, the imposition of the *New York Dock* conditions in the FD 34100 Notice was appropriate. The Board issued a Decision imposing the *New York Dock* conditions "[b]ecause the transaction involves two Class II rail carriers."⁴

¹ Finance Docket No. 34128, *RailAmerica, Inc.—Control Exemption—New StatesRail Holdings, Inc. and Alabama & Gulf Coast Railway L.L.C.* ("the FD 34128 Notice").

² Finance Docket No. 34129, *RailAmerica, Inc.—Control Exemption—StatesRail Acquisition Corp. and StatesRail, Inc.* (the "FD 34129 Notice").

³ Finance Docket No. 34100, *RailAmerica, Inc.—Control Exemption—ParkSierra Acquisition Corp. and ParkSierra Corp.* (the "FD 34100 Notice").

⁴ *RailAmerica, Inc.—Control Exemption—ParkSierra Acquisition Corp. and ParkSierra Corp.*, STB Finance Docket No. 34100 (STB served December 20, 2001) and published in the *Federal Register* (66 FR 65776-65777) on December 20, 2001.

Subsequently, the Board served and published notices of RailAmerica's control of Alabama & Gulf and the StatesRail Railroads.⁵ In those notices, the Board imposed the *New York Dock* conditions "[b]ecause RailAmerica will control more than one Class II rail carrier." *Alabama & Gulf Decision* at 2, and *StatesRail Decision* at 2.

Based on the sequence of the filings made by RailAmerica and the effective dates of the notices, the Board had every reason to conclude that RailAmerica would acquire control of ParkSierra before, or simultaneous with, the acquisition of control of Alabama & Gulf and the StatesRail Railroads and that imposition of *New York Dock* in all three proceedings was appropriate. However, that did not turn out to be the case.

RailAmerica's acquisition of control of ParkSierra, on the one hand, and Alabama & Gulf and the StatesRail Railroads, on the other, were two separate and distinct transactions. One transaction could close while the other could be terminated. Until the completion of closing there was no guaranty that either transaction would be consummated.

RailAmerica obtained control of Alabama & Gulf and the StatesRail Railroads on January 4, 2002 when that transaction was consummated. *Zorkers VS.* At that time RailAmerica did not control ParkSierra and it was not certain that RailAmerica would ever control ParkSierra.⁶ RailAmerica only controlled one Class II railroad at the time it acquired control of Alabama & Gulf and the StatesRail Railroads.

⁵ *RailAmerica, Inc.—Control Exemption—New StatesRail Holdings, Inc. and Alabama & Gulf Coast Railway L.L.C.*, STB Finance Docket No. 34128 (STB served December 28, 2001) and published in the *Federal Register* (66 FR 67363) on December 28, 2001 ("*Alabama & Gulf Decision*"); and *RailAmerica, Inc.—Control Exemption—StatesRail Acquisition Corp. and StatesRail, Inc.*, Finance Docket No. 34129 (STB served December 28, 2001) and published in the *Federal Register* (66 FR 67362-67363) on December 28, 2001 ("*StatesRail Decision*").

⁶ Although the notice of RailAmerica's control of ParkSierra had become effective by January 1, 2002, RailAmerica was not required to consummate the transaction pursuant to the Board's

ARGUMENT

“Under 49 U.S.C. 11326(b), when approval is sought under sections 11324-25, for a transaction involving one Class II and one or more Class III rail carriers, there shall be a fair arrangement as required under section 11326(a), except that such arrangement shall be limited to one year of severance pay equal to the employee’s earnings during the 12-month period preceding the filing date.” *Paducah & Louisville Railway, Inc.--Control Exemption--Paducah & Illinois Railroad Company*, STB Finance Docket No. 33362 (STB served August 25, 1997), at 4. The level of labor protection developed by the Board for a transaction involving one Class II and one or more Class III rail carriers is *Wisconsin Central. South Central Florida Express, Inc.--Trackage Rights Exemption--Florida East Coast Railway Company*, STB Finance Docket No. 33562 (STB served November 6, 1998) (“*South Central Florida*”).

At the time RailAmerica acquired control of Alabama & Gulf and the StatesRail Railroads, only one Class II railroad was involved in the transaction. The Board did not and could not have known this at the time of the *Alabama & Gulf Decision* and *StatesRail Decision*.

The issue presented in these proceedings is very similar to the issue in *South Central Florida*. Here, RailAmerica did not know the order of the closing of the three transactions at the time it filed with the Board. To the extent that the *Alabama & Gulf Decision* and *StatesRail*

authority. “[A]uthority granted by the Board is permissive, not mandatory.” *The Kansas City Southern Railway Company—Trackage Rights Exemption—Gateway Western Railway Company and Gateway Eastern Railway Company*, STB Finance Docket No. 33780 (STB served September 16, 1999) at 3. “Any authority granted is permissive in nature, not mandatory. The Board has held that, once authority becomes effective, it is up to the parties to decide whether and how to go forward. See *Missouri Central Railroad Company-Acquisition and Operation Exemption-Lines of Union Pacific Railroad Company*, STB Finance Docket No. 33508 *et al.* (STB served Sept. 14, 1999).” *Lackawanna County Railroad Authority--Acquisition Exemption-F&L Realty, Inc.*, STB Finance Docket No. 33905 (STB served October 22, 2001), at 6.

Decision relied upon the assumption that RailAmerica would control ParkSierra (thereby controlling two Class II railroads) at the time it acquired control of Alabama & Gulf and the StatesRail Railroads, it was in error. Circumstances changed between the time the notices were filed with the Board and the transactions were closed. RailAmerica contends that the Board should adopt the conclusion it reached in *South Central Florida* at 3 here.

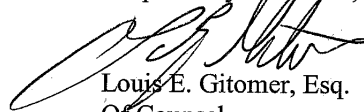
... has shown that the Board's notice of exemption that relied on erroneous information in the verified notice of exemption in imposing labor protection contained material error. Under 49 U.S.C. 11326(b), labor protection for this transaction is limited to one year of severance pay unless the parties agree to other terms. Based on the record now before us, there seems to have been no agreement on terms other than those established by the statute. Under these circumstances, we have no authority to impose terms beyond those in the statute and we erred in doing so. We will grant the petition to reopen.

CONCLUSION

RailAmerica respectfully requests the Board to modify the *Alabama & Gulf Decision* and the *StatesRail Decision* to impose the appropriate labor protective condition as follows:

As a condition to this exemption, any employees affected by the acquisition of control will be protected by the labor protection arrangements provided by 49 U.S.C. 11326(b), as explained in *Wisconsin Central Ltd.—Acquisition Exem.—Union Pac. RR.*, 2 S.T.B. 218 (1997).

Respectfully submitted,



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Attorneys for RAILAMERICA, INC.

Dated: March 1, 2002

VERIFIED STATEMENT OF WALTER S. ZORKERS

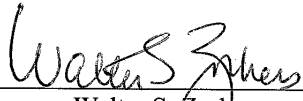
My name is Walter S. Zorkers, and I am the Senior Vice President Strategic Planning of RailAmerica, Inc. ("RailAmerica"), a Delaware corporation. I have been involved in the acquisition of control of ParkSierra Corp. and the Alabama & Gulf Coast Railway, L.L.C. ("Alabama & Gulf"), a Class III railroad, and StatesRail, Inc., a holding company controlling Arizona Eastern Railway Company, Eastern Alabama Railway, Kyle Railroad Company, San Joaquin Valley Railroad Company, and SWKR Operating Co. (collectively the "StatesRail Railroads"), all Class III railroads.

RailAmerica acquired control of Alabama & Gulf and the StatesRail Railroads on January 4, 2002. At that time, RailAmerica controlled 23 Class III railroads and one Class II railroad. The Alabama & Gulf and the StatesRail Railroads were all Class III railroads at the time RailAmerica acquired control of them.

RailAmerica consummated its acquisition of control of ParkSierra on January 8, 2002.

I Walter S. Zorkers, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on March 1, 2002.



Walter S. Zorkers