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October 21, 2002

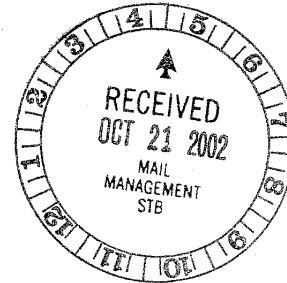
Via HAND DELIVERY

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

Re: **NORTH CAROLINA STATE PORTS AUTHORITY -- ACQUISITION
EXEMPTION -- NORTH CAROLINA PORTS RAILWAY COMMISSION,
FINANCE DOCKET NO. 34258**

Dear Secretary Williams:

This letter is written in response to the letter dated October 11, 2002 and filed by Messrs. Phillips, Fryar, and Mann (the "Individuals") in the above referenced docket on October 15, 2002. That letter, which is filed in informal opposition to the North Carolina State Ports Authority's ("SPA") Motion to Dismiss the Verified Notice of Exemption filed October 1, 2002, makes several erroneous and unsupported arguments. The Individuals are certain officers or former officers and/or members of the Board of the Ports Railway Commission, the entity whose assets are being transferred to SPA.



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At the outset, SPA notes that, even setting aside the question of their doubtful standing, the Individuals do not explain how they stand to benefit if the Board asserts its jurisdiction over the transaction, either in their individual capacities or as citizens of North Carolina. They are neither shippers nor carriers affected by the proposed transactions, and it is questionable whether even minority shareholders of a company would have standing in an exemption proceeding such as this. *See Merger -- The Baltimore and Ohio Railroad Co. and the Chesapeake & Ohio Railway Co.*, Finance Docket No. 31035, slip op. at 2 (ICC served March 2, 1988); *Colorado and Southern Railway Co. -- Merger Into Burlington Northern Railroad Co. -- Exemption and Request for Determination of Fairness*, Finance Docket No. 29757, slip op. at 5-6 (ICC served Dec. 31, 1981). Instead of identifying any cognizable interest in the question of the Board's jurisdiction, the Individuals proceed with an academic and flawed discussion of the merits of that question. The Board should summarily dismiss the opposition for lack of standing as well as lack of any nexus to the public interest.

On the merits, the Individuals argue that certain provisions of the proposed easements and operating agreements are inconsistent with the agreements accepted by the Board in *Department of Transportation -- Acquisition and Operation Exemption -- Maine Central Railroad Company*, 8 I.C.C. 835 (1991) (hereinafter "*State of Maine*"), and its progeny, including *State of Vermont -- Acquisition Exemption -- Certain Assets of Boston and Maine Corporation*, Docket No. 33830 (STB decided June 1, 2000) (hereinafter "*State of Vermont*").

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The essence of the Individuals' argument is that SPA retains too much control over the carrier that will operate the rail lines being acquired by SPA. What the Individuals fail to appreciate, however, is the fact that the easements and operating agreements in this transaction are modeled on the very easement and operating agreement accepted by the Board in *State of Vermont*. In fact, the provisions criticized by the Individuals in their letter are nearly identical to provisions appearing in the *State of Vermont* easement and operating agreement attached as Exhibits B and C to State of Vermont's Motion to Dismiss filed December 3, 1999. To the extent the wording of the provisions at issue depart from the precise wording of the correlating provision in the *State of Vermont* agreements, the differences generally result in SPA retaining less control than that retained by the Vermont Agency of Transportation ("VAOT") and accepted by the STB in *State of Vermont*.

The bottom line is that the provisions identified by the Individuals have previously been found by the Board to be acceptable in a *State of Maine* type transaction, as they do not impair or restrict the carrier's ability to provide common carrier service without interruption or interference. Because SPA will not acquire a common carrier obligation as a result of the transaction, nor will it hold itself out as a common carrier, there is simply no basis for imposing a "residual common carrier obligation" on SPA as sought by the Individuals. The asset acquisition by SPA will not make SPA a "carrier" and is not subject to Board jurisdiction. Accordingly, the motion to dismiss should be granted.

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Permanent and Unconditional Nature of the Proposed Easements

The Individuals erroneously assert that the easements that the PRC would grant to the Wilmington Terminal Railroad, L.P. ("WTR") and Carolina Rail Service, LLC ("CRS") are not "permanent, unconditional easements" like the easement accepted by the STB in *State of Vermont*. Rather, the Individuals claim that WTR and CRS will receive "only five year easements," and that this makes the transaction ineligible for *State of Maine* treatment. The Individuals, however, misconstrue the nature of these easements and what the Board means by "permanent" easement. The Board has never required that the initial grantee retain the easement and the operating authority forever, or that the state agency that acquires the rail assets cede all authority to compel assignment of the easement as the Individuals suggest. Such a requirement would be folly. It would impair the ability of another carrier to assume service on the line in the event that the grantee is unable to continue to perform its common carrier obligations. Thus, the Board has expressly sanctioned provisions, like those at issue here, that specify a term of years for the operating agreement and permit the state agency that acquired the rail assets to compel the original operator of the line to assign or transfer the easement if the operating agreement is not renewed or if the operator fails to provide service or carry out its other obligations under the applicable agreement. *E.g. State of Vermont*, slip op. at 3. The proposed easements are, nevertheless, permanent because they can be terminated only "upon the termination, pursuant to an order of the [STB], of common carrier rail service." See Draft Easements attached to SPA's Motion to Dismiss as Exhibits B and C ("Easements") at Section 2. Indeed, the Easements

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expressly provide that the easements themselves shall not be terminated by the cessation of rail service by WTR or CRS “done as part of a transfer of its common carrier rights and obligations to a permitted successor or assign.” *Id.* Thus the easements themselves are permanent, although the operator may change.

The five-year term of the proposed operating agreements is entirely consistent with Board precedent discussed in the Motion to Dismiss and wholly ignored by the Individuals. In *State of Vermont*, the STB approved an operating agreement that had a mere six month initial term. *State of Vermont*, slip op. at 3.

In addition, the proposed easements grant greater rights than those granted by the easement accepted by the STB in *State of Vermont*. For example, the easement in *State of Vermont* was limited to the provision of freight rail service. See Finance Docket No. 33830, *Motion of State of Vermont to Dismiss Notice of Exemption*, Exhibit B (filed December 3, 1999). In contrast, the proposed easements in this matter are not limited to freight service, but encompass all “common carrier rail services.” See Easements at Section 2.

Designated Operator

The Individuals also attack the reference in the proposed operating agreement to a “Designated Operator,” incorrectly equating that term as it is used in the proposed operating agreement with the “designated operator” provisions of 49 C.F.R. 1150.11. This is pure sophistry, since the term “Designated Operator” is clearly defined in the agreement:

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The successor operator who is nominated by the SPA to perform all railroad operations on the tracks which are the subject of this Agreement at the termination hereof.

See Draft Operating Agreements attached as Exhibits D and E to SPA's Motion to Dismiss, at Section 1. That definition clearly does not incorporate the regulatory provisions of Section 1150.11 as the Individuals suggest. Finally, the Individuals ignore the fact that the term "designated operator" also appears in the operating agreement accepted by the STB in *State of Vermont*.

Prior Consent to Assignment

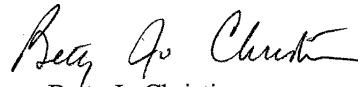
The Individuals also take issue with section 22 of the proposed operating agreements, which requires SPA's prior approval to the transfer or assignment of any of WTR's or CRS's rights under the easement or operating agreement. However, in *State of Vermont*, the Board accepted an easement and operating agreement containing similar provisions. In fact, the relevant provisions in the agreements accepted in *State of Vermont* were more restrictive than the provisions at issue here. In the *State of Vermont* operating agreement, the VOAT could withhold consent to assignment or transfer in its "sole discretion." See Finance Docket No. 33830, *Motion of State of Vermont to Dismiss Notice of Exemption*, Exhibit C, at Section 14 (filed December 3, 1999). In contrast, SPA can withhold consent only in its "reasonable discretion." Draft Operating Agreements attached as Exhibits D and E to SPA's Motion to Dismiss, at Section 22.

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For the foregoing reasons, the Board should dismiss or deny the Individuals' informal opposition.

Very truly yours,


Betty Jo Christian

STEPTOE & JOHNSON LLP

CERTIFICATE OF SERVICE

I hereby certify that I have on this 21st day of October, 2002, served copies of the foregoing letter by regular mail, postage pre-paid, on the following parties:

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Attn: William Stanfield

Cape Fear Bulk
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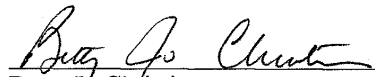
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